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80-5161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980.

No. _____

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

BILLY LEON HESKETT

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(918-287-1545)

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KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for ~~first~~ second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

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KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma, entered the 21st day of May, 1980.

OPINIONS BELOW

The Court of Criminal Appeals of the State of Oklahoma assumed jurisdiction upon petitioner's appeal and entered its opinion of 24 June, 1976, denying said appeal. See Johnson v. Oklahoma, 51 Okla. Bar J. 1411 (1980).

JURISDICTION

The Judgment of the Court of Criminal Appeals of the State of Oklahoma was pronoucned as aforesaid on the 21st day of May, 1980. The jurisdiction of this Court is invoked under Title 28, § 1257(3) of the United States Code.

Article 7, §1, of the Constitution of Oklahoma provides:

> "The judicial power of this State shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, Courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

Under Title 2, §40, of the Oklahoma Statutes, the following provisions place the appellate jurisdiction of all criminal cases in the Court of Criminal Appeals, to wit:

> "The Criminal Court of Appeals shall have exclusive appellate jurisdiction, co-extensive with the limits of the State, in all criminal cases appealed from the district, superior and county courts, and such other courts of record as may be established by law."

It is well settled that when the Court of Criminal Appeals was established by law with exclusive appellate jurisdiction in criminal cases, such jurisdiction ceased on the part of the Supreme Court of Oklahoma and the Court of Criminal Appeals became in fact and in law the Supreme Court of the State of Oklahoma in all criminal cases. See Corley v. Adair County Court, 10 Okla. Cr. 104, 134 Pac. 835 (1913); Buck v. Dick, 27 Okla. 854, 113 Pac. 930 (1911). Therefore, judgment issued on the 21st day of May, 1980, was a decision by the highest state tribunal having jurisdiction in such matters.

QUESTIONS PRESENTED

(1) Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for ~~first~~ second degree

murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the former jeopardy prohibition clause of the Fifth Amendment of the United States Constitution as made applicable to the States through the due process clause of the Fourteenth Amendment. See Benton vs. Maryland, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. The Fifth Amendment reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." [Emphasis added.]

STATEMENT OF CASE

I. Procedural History of the Case.

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the petitioner entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the

crime of kidnapping from the information for first degree murder. The motion was denied. The petitioner then petitioned the Oklahoma Court of Criminal Appeals for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. The Oklahoma Court of Criminal Appeals, first issued same but, upon rehearing, denied the writ.

The United States Supreme Court granted certiorari, vacated the order of the Oklahoma Court of Criminal Appeals denying the writ of mandamus, and remanded for further consideration with particular attention to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See Johnson v. Hampton, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand the Oklahoma Court of Criminal Appeals held that the crime of first degree murder, necessarily included the lesser offense of kidnapping for the purpose of extortion and prohibited the trial of the petitioner as originally charged, stating:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown v. Ohio and Harris v. Oklahoma, supra."

See Johnson v. Hampton, Okla. Cr., 572 P.2d 1301 (1978). Subsequently, over the petitioner's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

Upon the second degree murder conviction, petitioner took a timely appeal still asserting the grounds of double jeopardy. The Oklahoma Court of Criminal Appeals on 21 May, 1980,

affirmed the conviction and denied the plea of double jeopardy. See Johnson v. Oklahoma, 51 Okla. Bar J. 1411 (1980). Same was a final judgment of the State of Oklahoma's court of last resort in criminal matters. See Okla. Const., Art. 7, §1; 2 Okla. Stat. §40; and 22 Okla. Stat. §1070.

II. The Facts Material to the Questions Presented.

Kurk Kendall Johnson, the petitioner herein and the defendant in Case No. CRF-75-690, District Court of Tulsa County, and Case No. CRF-75-294, District Court of Osage County, is hereinafter referred to as Johnson. The State of Oklahoma is hereinafter referred to as State.

The State in the Tulsa County case charged and convicted Johnson with the crime of "kidnapping for purpose of extortion." Johnson was sentenced to sixty (60) years with the Oklahoma Department of Corrections. In the Osage County case, Johnson was charged by the State with the crime of murder in the first degree, but same was reduced to murder in the second degree. Johnson was convicted and sentenced to ten (10) years to life with the Oklahoma Department of Corrections. He appealed but the conviction was, as aforesaid, affirmed.

The State, at the Tulsa County trial and the Osage County trial, introduced evidence that Johnson and one Larlan Keith Knight kidnapped Earl Edward Bell when he was leaving his place of employment in downtown Tulsa. The State's evidence further attempted to show that they took Bell in Johnson's automobile to Johnson's apartment in Tulsa, leaving Bell in the trunk of the car. They allegedly attempted to extort monies for Bell's safe

return, but were unsuccessful, and Knight went home and out of town the next day on a trip with members of his family. The State further attempted to show that Bell was found dead in Osage County, that shell casings found at the scene were fired by Johnson's gun and that a witness identified Johnson as the kidnap caller, together with other evidence.

III. Federal Question of Fifth Amendment Double Jeopardy Raised in All Courts Below.

The double jeopardy questions were raised at all stages in the courts below commencing with arraignment in the district court. The questions were raised:

(1) At arraignment;

(2) Again by motion;

(3) By original writ of mandamus filed in the Oklahoma Court of Criminal Appeals;

(4) By petition for certiorari filed in the United States Supreme Court;

(5) By motion, styled second plea of double jeopardy, filed and presented prior to trial;

(6) At the trial; and

(7) Again on appeal to the Oklahoma Court of Criminal Appeals.

The constitutional question of double jeopardy has been continuously urged and preserved.

ARGUMENT

I.

Certiorari Should be Granted in the Instant Case Because

an Important Question Affecting the Prosecution of Criminal Cases and the Rights of Accused Throughout the Nation Under the Fifth Amendment is Involved: The Constitutional Doctrine of Double Jeopardy Should Forbid the States from Prosecuting Citizens for Multiple Offenses Arising Out of the Same Transaction.

The Fifth Amendment to the United States Constitution provides:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

This amendment has been made applicable to the States by the Fourteenth Amendment. See Benton v. Maryland, supra.

As noted by the Oklahoma Court of Criminal Appeals in its opinion affirming this case, the courts have utilized "dual" constitutional standards by utilizing two tests referred to as (1) the "same transaction test" and (2) the "same evidence test", or a variation of the two. See Johnson v. Oklahoma, supra; and also, Cowler v. Oklahoma, Okla. Cr., 589 P.2d 682 (1979). Further, the Oklahoma Court of Criminal Appeals, in the case below, argues that the United States Supreme Court has not said any one standard is required by the Fifth Amendment.

Johnson respectfully submits there should be but one test or standard interpreting a provision of the Federal Constitution, and the test as same relates to the double jeopardy prohibition should be the standard in the minds of the framers of the bill of Rights when drafted and when adopted. However, presently both the "one transaction test" and "the same evidence test" and/or a variation thereof, are applied without uniformity in the United States, notwithstanding a majority of state and federal courts follow "the same evidence test." See Twice in Jeopardy, 75 Yale L.J. 262 (1965); Note, Criminal Law: The Same

Offense In Oklahoma -- Now You See It, Now You Don't, 28 Okla.L. Rev. 131 (1975); Pennsylvania v. Campana, 452 Penn. 233, 304 A.2d 432 (1973); Oregon v. Brown, Oreg., 497 P.2d 1191 (1972); Note, Criminal Law-Double Jeopardy-Should "Offense" be Defined in Terms of Substantive Law? 38 Mo.L.Rev. 528 (1973); Note, The Protestion Against Multiple Trials, 11 Stan.L.Rev. 735 (1958).

The Bill of Rights to our Federal Constitution was proposed to the legislatures of the several states by the First Congress on 25 September, 1789. These first ten amendments were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: Delaware, 28 January, 1790; Maryland, 19 December, 1789; New Hampshire, 25 January, 1790; New Jersey, 20 November, 1789; New York, 27 March, 1790; North Carolina, 22 December, 1789; Pennsylvania, 10 March, 1790; Rhode Island, 15 June, 1790; South Carolina, 19 January, 1790; Vermont, 3 November, 1791; and Virginia, 15 December, 1791. Said states thereby met adoption requirements for said amendments and made them the law of the land prior to 1792. See U.S.C.S., Const., Amend., p. 709.

The "same evidence test" was for the first time judicially employed in the English case of Rex vs. Vandercomb and Abbott, 2 Leach 707, 168 Eng.Rep. 455 (1796). This was in 1796 or approximately four years after ratification and adoption of the Bill of Rights. Yet, it was seventy-six long years thereafter before the "same evidence test" was first applied in the United States. See Morey vs. Massachusetts, 108 Mass. 433 (1871). This was 80 years after adoption of the Bill of Rights and its

Fifth Amendment Double Jeopardy Clause.

Obviously, the framers of the Bill of Rights did not have the "same evidence test" in mind when writing the Fifth Amendment. It was not, at the time, a part of the English common law. The English judges did not invent same until four years after the adoption, nor were American judges to judicially proclaim same until another seventy-six years passed.

The Fifth Amendment Double Jeopardy Clause was to prohibit successive criminal prosecutions arising out of one transaction or episode! Such test simply forbids prosecution where the offense arose "out of the same transaction or episode" notwithstanding the "different evidence" or separate and distinct statutes. See Antieau, Modern Constitutional Law, Vol. 1, §5:29, p. 313.

The "same evidence test" has many critics. They include in their ranks recent and current members of the United States Court. In Ashe v. Swenson, 397 U.S. 436, 451, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion joined in by Justice Douglas and Justice Marshall, made a sharp critique of the "same evidence test", and pointed out that it "virtually annuls the constitutional guarantee" of the Fifth Amendment. Justice Brennan said:

> ". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes . . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal

> prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable."

Further, it should be noted that England, the originator of the "same evidence doctrine", has now deserted same. See Connelly v. Director of Public Prosecutions, A.C., 1254 (1964).

The problem is that not only does the "same evidence test" depart from the founders' intent, the legislative separately defined substantive crimes make infinite the number of substantive offenses that may arise from a single criminal episode. As the Oklahoma Court of Criminal Appeals pointed out in this case:

> "* * * mechanical application of the 'same evidence test' results in a decrease in the double jeopardy protection."

See Johnson v. Oklahoma, supra.

"The constitutional prohibition against 'double jeopardy,'" stated the United States Supreme Court in Green v. United States, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 211, 61 A.L.R.2d 1119, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." This Court added:

> "The underlying idea...is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty."

In the instant case, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case were virtually identical. While the offenses are

different, and the elements there are not the same, the evidence was the same, as was the transaction. It was but one criminal episode.

Johnson respectfully suggests that Oklahoma having elected to prosecute and having gotten a conviction of kidnapping, could not again prosecute and convict him for any other offenses connected with that single episode, including the charge of murder in the second degree. To allow Oklahoma to obtain both convictions violates Johnson's rights guaranteed by the Fifth Amendment Double Jeopardy Clause as envisioned by its framers.

PRAYER

WHEREFORE, Petitioner Johnson respectfully requests that a writ of certiorari issue to the Court of Criminal Appeals of the State of Oklahoma, and that the conviction therein be reversed, remanded and dismissed.

Respectfully submitted,

Billy Leon Heskett

(Court Appointed Attorney for Petitioner)

Jack Duane Heskett

(Co-counsel)

304 First National Bank Building
Pawhuska, Oklahoma 74056

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

A P P E N D I X

(Transcript of Proceedings)

I, the undersigned Deputy Clerk of the Court of Criminal Appeals, State of Oklahoma, do hereby certify that the attachments hereto are a complete roll of all the petitions, pleadings, orders and judgments in Case No. F-78-516, Court of Criminal Appeals of the State of Oklahoma, same being styled Kurk Kendall Johnson, Appellant, vs. State of Oklahoma, Appellee, and that said documents hereto attached, are, as noted thereon, true and correct copies of all such petitions, pleadings, orders and judgments.

Dated this 24th day of July, 1980.

ROSS N. LILLARD, JR., Clerk

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

By: Judy Wilson

(S E A L)

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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 15 1978
Ross N. Lillard, Jr.
CLERK

No. F-78-516

FURL KENDALL JOHNSON,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

P E T I T I O N I N E R R O R

COME NOW the appellant, Furl Kendall Johnson, by and through his court appointed attorney, Bill Peskett, of Pawhuska, Oklahoma, and petitions the Court against the State of Oklahoma, appellee, to reverse, dismiss and/or remand for new trial his conviction in case number CRF-75-294, District Court of Osage County, State of Oklahoma, and in support thereof states:

(1) That this appeal is from the aforesaid case, the Honorable Don H. Hampton, District Judge, presiding.

(2) That the appellant was convicted of the crime of Murder, Second Degree, by a jury trial, the verdict being returned on the 7th day of March, 1978, and judgment and sentence was imposed thereunder on the 29th day of March, 1978, in said District Court.

(3) That in accordance with said jury verdict the appellant was sentence to life imprisonment with the State Department of Corrections.

(4) That a motion for new trial was tirely filed on the 5th day of April, 1978, and denied by the District Court on the 7th day of April, 1978.

(5) That the appellant was already serving a sixty (60) year sentence from the District Court of Tulsa County, State of Okla-

homa, on a charge arising out of the same incident, and therefore, no bond was sought.

(f) That the following errors of law are urged as having been committed during the progress of the trial and the proceedings relating thereto:

(a) Error of the Court in overruling the appellant's [illegible] se writ of habeas corpus, motion to dismiss and [illegible] plea of former jeopardy.

(b) Error of the Court in overruling the appellant's [illegible] to suppress.

(c) Error of the Court in overruling the demurrer to the evidence.

(d) That the verdict and judgment are not sustained by sufficient legal evidence and are contrary to law.

(e) That the closing argument of the State was irregular and contrary to law and that throughout the trial there were leading and suggestive questions by the State, which errors were objected to by appellant.

WHEREFORE, Appellant prays that said judgment and sentence be set aside with the action dismissed and/or reversed and remanded for a new trial.

Attorneys for Appellant

[illegible]

[illegible] Hesbett
P. O. Box 447
Pawhuska, Oklahoma 74056
(918/287-1545)

VERIFICATION AND AFFIDAVIT IN FORMA PAUPERIS

STATE OF OKLAHOMA, Osage County) ss.

[illegible] Hesbett, of lawful age and being first sworn, [illegible] states that he is the court appointed attorney for [illegible] that the contents of the foregoing instrument [illegible] and subscribed by him; that the affidavit is not made by the appellant himself and is made by the affiant for the reason that [illegible]

lant is presently not within the County, [illegible] in the Oklahoma State Penitentiary; that affiant knows and [illegible]'s the statements therein contained and that same are true; that the appellant is a poor person without funds or property or relatives willing to assist him in paying for filing the within instrument, as is more fully evidenced by "Exhibit A" attached hereto and made a part hereof.

[illegible]

Subscribed and sworn to before me this 14th day of September, 1979.

[illegible], Notary Public.

My commission expires: 29 October 1981.

(S E A L)

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the [illegible] September, 1979, a true and correct copy of the above and foregoing instrument was mailed to:

Larry Derryberry
Attorney General
State Capitol Building
2302 Lincoln Blvd.
Oklahoma City, Oklahoma 73105

and

Miller Hall, Esq.
District Attorney
Pawnee County Courthouse
Pawnee, Oklahoma

with postage thereon [illegible]

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Petition for Writ in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of July 1980.

Clerk

By Judy Wilson
DEPUTY

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 12 1979
Ross N. Lillard, Jr.
CLERK

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

KURK KENDALL JOHNSON, Appellant,

vs.

STATE OF OKLAHOMA, Appellee.

BRIEF OF APPELLANT IN SUPPORT OF PETITION IN ERROR

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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLANT IN SUPPORT OF PETITION IN ERROR

The appellant, Kurk Kendall Johnson, hereinafter called Johnson, appeals from a jury verdict of guilty to a charge of Second Degree Murder. The conviction arises out of the District Court of Osage County. The appellee is hereinafter referred to as the State.

Statement of Fact and Procedural History: The State arrested the defendant, Kurk Kendall Johnson, on the 31st day of March, 1975. He was thereafter charged with Kidnapping for Purposes of Extortion in the District Court of Tulsa County, Oklahoma, and with the crime of First Degree Murder, 21 Oklahoma Statutes § 701-1, in the District Court of Osage County, State of Oklahoma.

A preliminary hearing was held in both cases. Johnson was bound over for trial on both charges in the respective District Courts.

On the 5th day of September, 1975, Johnson was convicted of Kidnapping for Purposes of Extortion by a Tulsa County District Court jury. He was sentenced to sixty (60) years and his appeal of that conviction was sustained by this honorable Court. See Johnson vs. State, Okla. Cr., 554 P.2d 51.

Before a trial for murder was held in Osage County, Johnson filed a plea of double jeopardy and a motion to strike from the First Degree Murder information the words relating to Kidnapping for Purposes of Extortion. The District Court overruled the plea and the motion. Thereupon, Johnson filed a writ of mandamus in this Court seeking to have the words striken from the information. The writ was denied and Johnson filed a petition for certiorari in the United States Supreme Court. The Supreme Court granted certiorari and vacated this Court's denial of mandamus, ordering that it consider the matter in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912.

After the foregoing, this Court prohibited the District Court of Osage County from proceeding with the First

Degree Murder charge under Title 21, Section 701.1 of the Oklahoma Statutes [Laws 1973, c. 167, § 1]. This Court directed that the words relating to the kidnapping be striken from the information and stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown vs. Ohio and Harris vs. Oklahoma, supra."

Thereafter, the Honorable Don H. Hampton, District Judge, District Court of Osage County, struck the words relating to the kidnapping from the information. The State, over a renewed plea of former jeopardy and pro se motions relating to estoppel by judgment and double jeopardy, all of which were overruled by the District Court, proceeded to try Johnson for Second Degree Murder.

The State contended at the trial that Johnson and one Harlan Knight on the 30th day of March, 1975, kidnapped Earl Edward Bell at knife point and placed him in the trunk of Johnson's vehicle. Further, the State contends that later that night Harlan Knight left Johnson's company, Bell still being in the trunk of Johnson's vehicle.

The next day Knight, according to the State, went with members of his family to visit relatives in suburban

Kansas City. Meanwhile, Johnson, according to the State, attempted to extort members of Bell's family for ransom.

The Tulsa Police Department made recordings of the ransom calls. One of the calls made reference to an employee of the Picadilly Cafeteria in Tulsa. Inasmuch as Bell was assistant manager of the cafeteria, the Tulsa Police contacted the employee, had him listen to the tapes, and, according to the State, the employee identified the voice on the tapes as that of Johnson.

The Tulsa Police after some four or five hours, went to Johnson's home and arrested him on an old traffic warrant. Johnson was removed and thereafter, without a search warrant, officers searched Johnson's vehicle and found various articles, including a .22 caliber rifle which the State contends was used to kill Bell who was later found shot to death and laying in a ditch in Osage County.

As hereinbefore stated, a Tulsa jury convicted Johnson of Kidnapping for Purposes of Extortion and he was sentenced to sixty (60) years. Harlan Knight, under a separate information, pleaded guilty to Kidnapping and was sentenced in Tulsa County to fifteen (15) years.

The jury convicted Johnson of Second Degree Murder and Judge Hampton, on the 29th day of March, 1978, sentenced

him to serve ten years to life with the State Department of Corrections.

Johnson filed a timely motion for new trial which the District Court overruled. Thereafter, this appeal was timely taken.

I. Error of the Trial Court in Ruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy.

The Supreme Court of the United States in Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364, ordered that this matter proceed in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912. This Court on the 4th day of January, 1978, ordered that the matter proceed in light thereof. See Johnson vs. Hampton, District Judge, Okla. Cr., 572 P.2d 1301.

In the Harris Case, supra, the Supreme Court stated:

> "A person who has been tried and covicted for a crime which has various incidents included in it, cannot be a second time tried for one of those incidents without being twice put in jeopardy for that same offense."

In Brown vs. Ohio, supra, the Supreme Court stated that:

> "Where successive prosecutions are at stake, the guarantee [against double jeopardy] serves 'a constitutional policy of finality for the defendant's benefit.'"

This constitutional prohibition is profoundly stated:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb."

See U. S. Const., 5th Amend.; and also, Okla. Const., Art. 2, § 21; 22 Okla. Stat. §§ 14, 522.

"The constitutional prohibition against 'double jeopardy,'" stated the Supreme Court in Green vs. United States, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The Supreme Court added:

> "The underlying idea...is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty."

This amendment has been made applicable to the States by the Fourteenth Amendment. See Benton vs. Maryland, 395 U.S.

784, 23 L.Ed.2d 707, 89 S.Ct. 2056.

In Brown vs. Ohio, supra, the Supreme Court further said:

> "The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"

It continued that the policy protects the accused:

> "...from attempts to secure additional punishment after a prior conviction and sentence, see Green vs. United States, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 78 S.Ct. 221; 77 Ohio L.Abs. 202, 61 A.L.R.2d 1119 (1957); cf. North Carolina vs. Pearce, supra, [395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072]."

While Johnson recognizes the Blockburger Test as the established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment, the Supreme Court in a footnote and in its holding in the Brown Case, supra, held that the Blockburger Test is not the only standard for testing the constitutional requirement. See Blockburger vs. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180; footnote 6, 97 S.Ct. 195. In the Brown Case, supra, the defendant was arrested nine days after he had stolen an automobile, the defendant pleaded guilty

to a misdemeanor charge of joyriding [taking or operating a car without the owner's consent under Ohio law], the joyriding charge having been based on the defendant's driving of the automobile on the last day of his nine day joyride. Thereafter, the defendant pleaded guilty in a court to a felony auto theft charge based on his original taking of the auto, the Ohio courts rejecting the defendant's double jeopardy objections. The Supreme Court in refusing to apply the Blockburger Test to these circumstances noted:

> "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause, barred prosecution of the accused for robbing the other victims. And in In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a two-and-one-half year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period."

The Supreme Court, in that note, continues:

> "In both cases, strict application of the Blockburger test would have permitted im-

position of consecutive sentences had the charges been consolidated in a single proceeding. In Ashe, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See Ebeling vs. Morgan, 237 U.S. 625, 59 L.Ed 1151, 35 S.Ct. 710 (1915). In Nielsen, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the 'same' for purposes of protecting the accused from having to 'run the gantlet a second time.' Ashe, supra, at 446, 25 L.Ed.2d 469, 90 S.Ct. 199, 78 S.Ct. 221; 77 Ohio L.Abs. 202, 61 A.L.R.2d 1119 (1957).

Because we conclude today that a lesser included and greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe and Nielsen."

Clearly, Johnson had to "run the gantlet" twice, once for the kidnapping and again for the charge of second degree murder, notwithstanding that they were as in Nielsen, supra, one transaction and actually the "same" crime.

The charges in In re Nielsen, supra, were for crimes involving different proof. Adultery required proof of:

(1) Intercourse with one woman,

(2) While married to another woman.

Cohabitation required proof of:

The defendant having lived with more than one woman at the same time.

Yet, to prevent the prosecution from attempting to secure additional punishment after a prior conviction and sentence, the Supreme Court held that the offenses were the "same" for purposes of protecting the defendant from having to "run the gantlet" a second time.

Here, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case is not just "overlapping", except for a few facets of testimony relating to arrest, etc., it is identical. Cf. Iannelli vs. United States, 420 U.S. 770, 785 n 17, 43 L.Ed.2d 616, 95 S.Ct. 1284. The charges against Johnson became a "trial by ordeal". He was forced by the District Court to "run the gantlet" a second time.

It should be noted that England, the country from which the double jeopardy doctrine came to us, has again adopted the "same evidence test". See Connelly vs. D.P.P., AC 1254. The test would simply forbid prosecution where the offense arose "out of the same transaction" notwithstanding the "different evidence" or separate and distinct statutes. Further, Justices Brennan, Douglas and Marshall have urged the adoption of this test. See Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 481, 90 S.Ct. 1189; Brown vs. Ohio, supra; Thompson vs. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768.

Johnson submits that the time has come when this Court, like those in England, must reconsider the logic of the State's position in light of the "real" meaning of the fundamental prohibition against double jeopardy. Further, the standard of Nielsen should, Johnson submits, be applied in this case, thereby forbidding this prosecution.

II. Error of the Court in Ruling the Appellant's Motion to Supress and His Demurrer to the Evidence.

In Johnson vs. State, Okla. Cr., 554 P.2d 51, this Court held that it was proper for the Tulsa police officers to go to the home of the defendant, arrest him, take him away, open the trunk of defendant's automobile and search the trunk where they found incriminating evidence. The cited case was an appeal arising out of the trial for kidnapping of Bell, and while the facts relate to that case in the present case, the evidence relating to the search is nonetheless, different. See Tr., Sundry Motions, 27 Feb., 1978, pp. 3-14.

In this case, the evidence is that while the Tulsa police had learned from telephone tapes from the "ransom caller" that Bell was in the trunk of the "ransom caller's" automobile, they, through the same method or source, later learned that he was no longer in the trunk of the car. These tapes were introduced in evidence at the trial in the State's case in chief

over objection and after Johnson had moved to suppress them. See Trial Tr., pp. 171, 419. The "ransom caller", subsequent to his earlier phone call stating that Bell was in the trunk of his car, advised that he was not there any more. See Trial Tr., pp 419 (tapes of telephone calls).

The State's witness William Lee Hadley testified that the Tulsa police played the tapes of the "ransom caller" to him. He stated that he recognized the voice of the caller as "Kurk Kendall Johnson". See Trial Tr., pp. 212-219.

Carroll E. Gatlin, a detective with the Tulsa Police Department and a witness for the State, testified that it was approximately 3 o'clock P.M., on the day in question, when he went back to the Department and he, together with other officers talked with Hadley. Further, he testified that it was not until approximately 9 o'clock P.M., of that date that the officers went to Johnson's residence. See Trial Tr., pp. 375-377. According to Gatlin, the officers had spent their time searching for an old bench warrant on a traffic ticket, interviewing William "Peanuts" Johnson, etc. It was only after the foregoing that the officers then went to Johnson's apartment at approximately 9 o'clock P.M., that day.

Gatlin's testimony as to what the officers did when they got there is as follows:

"Q All right. Would you tell the Court, please, Carroll, when you went to the back of the house there with the other officer, could you view into the house?

A Yes, sir. We could.

Q Could you see any individuals laying on the bed?

A Yes, sir. We could.

Q Was that individual later determined by you to be Kurk Kendall Johnson?

A Yes, sir. It was.

Q Was he dressed?

A I don't remember.

Q Did you then go to the front of the house and knock on the door?

A Yes, sir.

Q You were present when the lady came to the door?

A Yes, sir. I was.

Q All right. And you entered. Is that correct?

A I think we stepped inside. Yes, sir.

Q Is it not true, to refresh your memory, that Kurk Kendall Johnson had to get dressed?

A Yes, he did, because we went in and watched him while he got dressed; walked in the bedroom with him. Yes, sir.

Q And you waited for him to get dressed.

A That's correct.

Q And you waited for that other car to come.

A Yes, sir.

Q All right. And when that police car came, you delivered Kurk Kendall Johnson to officers that came to that call. Is that correct?

A Yes, sir.

Q Now, Carroll, it was after that that you went to see Adrian Knowles and you got keys to the car. Is that right?

A Well, this all happened like in a period of two to three minutes, because the cars were already in the area.

Q That took them to get the car there?

A Yes, sir, from that time, and I'm not sure whether Kurk had left the premises at the time we looked in. There was a very short time span from the time he left until the time he looked in the trunk.

Q You handed him to the car -- you turned him over to the car that came to your summons. Isn't that correct?

A That is correct.

Q And you left him there with that car and then went back and looked in the car, did you not?

A When you say went back, went back where?

Q To the car.

A Yes, sir.

Q You had to get the keys from Adrian Knowles?

A Sargeant [sic] Putnam did, yes, sir.

Q Then you went to the car, did you not?

A Yes, sir.

Q All right. When you went to the car, did you ever have a conversation -- let me ask you this. Did you ever have a conversation with Kurk Kendall Johnson that evening about looking in the car?

A No, sir. I did not.

Q All right, sir. In other words, he was removed from the premises by a police car. He didn't come to your attention again after you started looking at the car, did he?

A No, sir."

See Trial Tr., pp. 383-385.

Obviously, the officers did not believe Bell was in the trunk of Johnson's automobile. They took hours to get to the apartment and when they got there they waited on Johnson to dress and waited for a police car to pick him up and take him downtown.

Clearly, the evidence presented at the trial in Johnson vs. State, supra, is far different. There the Court was lead by the State to believe that "time was of the essence" in the words of Judge Bussey. Further, it was stated by Judge Bussey, "An emergency was at hand." However, under the evidence in the instant matter, the officer's testimony fully shows that as far as getting in the trunk was concerned "time was not of the essence", that there was no "emergency", in their minds, that required getting into the trunk and that all of the officers knew

it. Their actions speak the truth and are louder in regard thereto than the testimony in the kidnapping case.

If the officers did not already know that Bell was not in the trunk -- why would they stand around while Johnson dressed and wait on the arrival of another police car? The "ransom caller" had already told them Bell was not in the trunk. They had talked at length with William "Peanuts" Johnson, the defendant's brother. Why had they spent so much time looking for an old bench warrant? Clearly, they would have had more than ample time to obtain a search warrant. When they opened the trunk they were NOT looking for Bell. At that point, they were making a routine search for evidence.

They should have had warrants. Clearly, they had ample time to have obtained same prior to coming to the apartment. At least, four to five hours passed between the time they were told the "ransom caller" sounded like "Kurk Kendall Johnson" and when they finally opened the trunk of Johnson's car.

Both the United States Constitution and the Oklahoma Constitution clearly guard against unreasonable searches and seizures. See U. S. Const., Amend. 4; Okla. Const., Art. 2, § 30; and also see 22 Okla. Stat. §§ 1221-1241. It has been consistantly held by this Court that in the absence of a provision of law justifying search without a warrant, evidence obtained as a result of violating this section would not be admissible against a defendant

in a criminal prosecution. See Moulton vs. State, Okla. Cr., 227 P.2d 422; Coburn vs. State, 59 Okla. Cr. 333, 60 P.2d 399; Gatewood vs. State, 57 Okla. Cr. 200, 46 P.2d 962; Wright vs. State, 52 Okla. Cr. 393, 5 P.2d 766; Tidwell vs. State, 52 Okla. Cr. 148, 3 P.2d 454; Roberts vs. State, 47 Okla. Cr. 280, 287 Pac. 793; Lewis vs. State, 39 Okla. Cr. 227, 264 Pac. 840; Hays vs. State, 38 Okla. Cr. 331, 261 Pac. 232; Jones vs. State, 38 Okla. Cr. 251, 260 Pac. 89; and Bassett vs. State, 34 Okla. Cr. 370, 246 Pac. 654, to cite only a few such holdings.

This Court has also held that the interpretation of the Fourth Amendment of the Constitution of the United States by the Supreme Court of the United States is obligatory upon the States by virtue of the Fourteenth Amendment. See Hughes vs. State, Okla. Cr., 522 P.2d 1331; and Lindsey vs. State, Okla. Cr., 488 P.2d 935. This Court is thus bound by the Supreme Court's rulings in this area.

The Supreme Court in Brown vs. United States, 411 U.S. 223, 32 L.Ed.2d 208, 93 S.Ct. 1565, unanimously ruled that the petitioners had no "standing" to contest a search with a defective warrant where:

> (1) The petitioners had no standing to contest the search and seizure, since they
>
> (a) were not on the premises at the time of the contested search and seizure,

(b) had no proprietary or possessory interest in the premises, and

(c) were not charged with an offense which included, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

The case involved a charge of interstate transportation of stolen goods. The goods, stolen from a warehouse in Ohio, were found through a search of a store located in Kentucky and owned by the petitioners' codefendant, whose case was tried separately. The petitioners were in custody in Ohio at the time of the search, which was conducted pursuant to a defective warrant.

Here, Johnson was:

(1) On the premises but was taken away by the police,

(2) The owner of the automobile according to the State's evidence, thereby having a proprietary and possessory interest in same, but

(3) He was not charged with an offense which included, as an essential element of said offense, possession of the seized evidence at the time of the search.

Clearly, the contemporaneous search of Johnson's automobile trunk was unconstitutional and he had "standing" to object which he did. Tr., Sundry Motions, 27 Feb., 1978, pp. 3-14; Trial Tr., pp. 287-289. The search was unconstitutional!

Again, Johnson vs. State, supra, is distinguishable. It was held in that case that "even if the search was unconstitutional", there was still sufficient evidence to convict Johnson of kidnapping. This is not the case here. The State might have proven kidnapping without the evidence obtained in the search but it would not have proven that Johnson committed the homicide.

Discovered in that search of Johnson's trunk that night was a .22 caliber rifle. Casings found at the scene of the shooting of Bell matched test casings fired from the rifle. Without this evidence, there would have been grave questions in the jury's mind.

Harlan Knight and William "Peanuts" Johnson testified to the kidnapping and that Johnson displayed a .22 caliber rifle exclaiming that he was not going to leave any witnesses. The various police witnesses testified to matters relating to evidence of the kidnapping, including possession of items belonging to Bell. The only other connection to the killing was a tape used on the decedent that was similar to that used on Johnson's car, a tape which was obviously common. There was, of course, evidence linking Johnson to the "ransom calls". However, none of the witnesses could testify that Johnson killed Bell. Johnson denied same on his plea and still denies it. Therefore, it is apparent that the State in the homicide case would not

have been able to overcome the test of "beyond a reasonable doubt" without the fruits of the unconstitutional search. See Mincey vs. Arizona, ____ U.S. ____, 57 L.Ed.2d 290, 98 S.Ct. 2408.

III. That the Verdict and Judgment are not Sustained by Sufficient Legal Evidence and are Contrary to Law.

Because of the illegal search discussed in Proposition II, much of the evidence introduced by the State was inadmissable and, in accordance with law, as set forth in Proposition II, not proper to place before the jury.

In addition to the foregoing, the form of the verdict required that the defendant be found "guilty" or "not guilty". While it is recognized by Johnson that this is customarily the case in all criminal proceedings in this State and across the United States, he nonetheless would point out that the jury does not have to find him "not guilty" but only has to have a reasonable doubt regarding his guilt. Therefore, Johnson contends that the form of the verdict was such that it violated his right to "due process of law" and placed upon the jury a duty which the defendant is not required to meet. See U. S. Const., Amend. 5, 6 and 14.

IV. That the Closing Argument of the State was regular and Contrary to the Law.

The United States Supreme Court, subsequent to the charges filed herein, held that mandatory death penalties in statutes such as Johnson was then charged under were unconstitutional. See Woodrow vs. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; and Roberts vs. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001; also see Riggs vs. Branch, Okla. Cr., 554 P.2d 823. Further, the United States Supreme Court in granting certiorari in this case, ruled that Johnson could not be tried for First Decree Murder. See Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364. Thereafter, this Court ordered District Judge Hampton to proceed with the case in accordance with Brown vs. Ohio, supra, and Harris vs. Oklahoma, supra. It specifically did not rule out a trial for some other charge of homicide. See Johnson vs. Hampton, District Judge, Okla. Cr., 572 P.2d 1301.

Title 21, Section 701.2 of the Oklahoma Statutes, the Second Degree Murder statute under which Johnson was tried never ever provided for a "death sentence". Under the law of the case then, Johnson could only be sentenced, if convicted, from ten years to life. See 21 Okla. Stat. § 701.4; and Wood vs. State, Okla. Cr., 557 P.2d 436. Both the prosecutor and Johnson agreed with Judge Hampton, prior to the trial, that this was the law of the case.

Notwithstanding the foregoing clearly being the law of

the case and same being fully understood by the prosecutor, he asserted the following in the State's closing argument:

> "* * * Kurk called him [Peanuts] from the jail. 'Find Duck. Tell him if he is any kind of cousin, he will find that body and get rid of it because if he don't I'll get the electric chair.' They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body, I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there. [Emphasis ours.]

Johnson objected but same was overruled. See Trial Tr., pp. 514-515. This is improper, unfair and prejudicial argument, constituting error. See Robertson vs. State, Okla. Cr. , 521 P.2d 1401; Herrod vs. State, Okla. Cr., 512 P.2d 1401; and Sizemore vs. State, Okla. Cr., 507 P.2d 1330.

Section 5.8, "Argument to the Jury", of the American Bar Association's Standards Relating to the Prosecution Function, sets the guidelines:

> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of

any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." [Emphasis added.]

These standards were adopted by this Court in Ray vs. State, Okla. Cr., 510 P.2d 1395.

Again, the prosecutor said:

"If there is any person whoever deserved it [the electric chair], he is sitting right in front of you, right there."

Clearly, he was attempting to inflame the passions of the jury. His argument went outside the law and injected an issue beyond that of Johnson's guilt or innocence. This Court in the recent case of Cooper vs. State, Okla. Cr., 585 P.2d 234, held that such conduct is error.

CONCLUSION

In conclusion, Johnson would respectfully show the Court that the question of former jeopardy, although argued

before, is still not at rest. It is clear that under the Nielsen Case, 131 U.S. 176, 33 L.Ed 118, 9 S.Ct. 672 (1889) the tests there outlined were not applied to his situation. It is Johnson's contention that he cannot be tried a second time for a crime arising out of the same action.

Further, the evidence obtained by the State's improper search of Johnson's automobile should have been supressed. Without the benefit of such improper evidence, the demurrer offered by Johnson at the conclusion of the State's case should have been sustained.

A verdict should be in a form other than one, as was the case here, that would require the jury to find the defendant "not guilty". The jury is only charged with the duty of finding him "guilty" if they have no "reasonable doubt".

Finally, the closing argument of the prosecutor was inflammatory. The state should not be allowed to argue that the defendant should be executed when same is clearly not the law of the case and the crime with which the defendant is charged carries no such punishment. Such argument by the State was clearly inflammatory to the passions of the jury.

Wherefore, for the reasons aforesaid, Johnson prays the Court to reverse the judgment and conviction herein and to order the District Court to proceed no further with him having to run the "gantlet" again and again.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 4th day of January, 1979, I mailed a true and correct copy of the foregoing Brief of Appellant in Support of Petition in Error to the Honorable Jan Eric Cartwright, Attorney General, State Capitol, Oklahoma City, Oklahoma, and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of January 19 79.

Ross N. Lillard, Jr. Clerk

By [illegible] DEPUTY

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 15 1979
Ross N. Liliard, Jr.
CLERK

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

CORRECTION TO APPELLANT'S BRIEF IN SUPPORT OF PETITION IN ERROR

Comes now Kurk Kendall Johnson, after having reexamined the brief submitted in support of his petition in error in the above captioned matter and advises the Court of the following typographical error:

(1) The title to Proposition I at page 5 reads:

> "Error of the Trial Court in Ruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy."

And should read:

> "Error of the Trial Court in Overruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy."

(2) The title to Proposition II at page 11 reads:

"Error of the Court in Ruling the Appellant's Motion to Supress and His Demurrer to the Evidence."

And should read:

"Error of the Court in Overruling the Appellant's Motion to Supress and His Demurrer to the Evidence."

(3) The title to Proposition IV at page 20 reads:

"That the Closing Argument of the State was regular and Contrary to the Law."

And should read:

"That the Closing Argument of the State was Irregular and Contrary to the Law.

Respectfully submitted,

Attorneys for Appellant
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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 12th day of January, 1979, I mailed a true and correct copy of the foregoing Correction to Appellant's Brief in Support of Petition in Error to the Honorable Jan Eric Cartwright, Attorney General, State Capitol Building, 2302 Lincoln Boulevard, Oklahoma City, Oklahoma, and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Correction to Brief ..... in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 24 day of July 19 79.

Clerk

By ..... DEPUTY

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 9 1979
Ross N. Lillard, Jr.
CLERK

BRIEF OF APPELLEE

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TIMOTHY S. FRETS
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STATEMENT OF THE CASE

Appellant, Kurk Kendall Johnson, hereinafter referred to as defendant, was charged by Information in Case No. CRF-75-294 with the crime of Murder in the Second Degree, pursuant to 21 O.S.1971, § 701 in the District Court of Osage County, Oklahoma (O.R. 1). The defendant was tried by jury and represented by counsel. The jury found the defendant guilty and punishment was set at ten (10) years to life in the custody of the State Department of Corrections (O.R. 166). From the aforesaid Judgment and Sentence, the defendant has now perfected his appeal to this Court.

STATEMENT OF THE FACTS

The State opened its case by calling Vernon Davis. He testified that he is an employee of the Picadilly Cafeteria in Tulsa. He stated that he knew the defendant from a supervisor-employee relationship at the Picadilly Cafeteria. Mr. Davis further testified that the deceased, Earl Bell, was his assistant at the cafeteria and that Bell was defendant's supervisor when he was absent. Bell was the supervisor on March 30, 1975.

At approximately 9:50 p.m., on March 30th, Davis stated that he received a phone call at home. The caller said "We have Mr. Dale in our custody and we want $20,000 tomorrow night or he will be killed," (Tr. 175). Davis replied, "You're crazy. I can't get no $20,000. I don't have it," and he hung up (Tr. 176). Four or five similar phone calls

followed from the same male caller but they were felt to be nothing more than prank calls (Tr. 179). A phone call from Mrs. Bell followed at about 11:45 p.m. Davis stated that up to that time he did not know that Bell was missing (Tr. 180). After listening to tape recordings made by the police, in which he identified the voice as that of the defendant's, he was positive that it was the same voice who had called him on the night of March 30th (Tr. 181-182).

The State next called Doris Bell, daughter of the deceased. She testified that at approximately 9:30 or 10:00 p.m., on March 30th, her mother and sister left the house to see if they could find Mr. Bell because he had not returned home from work. While they were gone she received a phone call, at approximately 10:00 or 10:30 p.m. The caller asked if they were looking for Bell and stated, "Well, we've got him and if you don't get $20,000 to us, we will kill him" (Tr. 191).

Celia Hollon was the State's next witness. She stated that she was also a daughter of the deceased, Earl Bell. She testified that she accompanied her mother to the Picadilly Cafeteria to see if Bell had worked late, this occurring at 9:30 p.m. on March 30th. They found Bell's car, its doors still locked, but there was no one in the cafeteria except the night watchman who hadn't seen him. They returned home around midnight after first checking the bank and the police station. At home they found Doris crying. After discussing the aforementioned phone call, the police were summoned.

Further testimony revealed that another phone call was received around 1:00 a.m., after the police had arrived. She said the caller told her to get the $20,000 together and gave her directions to the drop point, which was Vernon Manor Apartments (Tr. 195). She also stated that the caller, a male, indicated that he would kill Bell if the family failed to get the money (Tr. 196).

After stuffing newspaper into a paper bag to represent money, she left with a policeman to go to the drop site, this occurring around 1:30 a.m. She said another phone call was received around 8:00 a.m. which her mother answered. The caller said that he had spotted police at the drop sight and that they were to return for the money (Tr. 200), which was done.

That afternoon, Sunday, March 31st, another phone call was received which was recorded by the police. A subsequent "drop" followed, along with another phone call and another return trip for the package for the same reason as the first.

Another phone call was received with instructions for a third drop attempt. This drop was supposed to occur by a specified parked car. However, the designated car was never found and the drop was aborted. There were no other phone calls (Tr. 205).

Following a stipulation, the State called William Lee Lindley. He testified that he was employed at the Picadilly Cafeteria and that he knew the defendant through their relationship at work. He said that shortly after March 30th he went

to the Tulsa police station where he identified the voice on a tape recording as that of the defendant's (Tr. 214-215).

Lometta Bell, wife of the deceased Earl Bell, next testified for the State. She essentially reiterated the testimony of her daughter Celia Hollon. She did state that she received a phone call while Celia was making the first drop attempt. The contents of that conversation were:

> "Well, first he asked if we had gotten the money, and I said yes, my daughter was bringing it, and he asked me if I called the police, and I said no, and he said he didn't want any police. I asked him how my husband was and he said he was all rght, but he was getting cold in the trunk of that car, something like that, and I think I told him that she would put the money where they asked, and I think the voice said something about if we didn't, we would have a dead honky on our hands," (Tr. 225).

She stated that her husband had been wearing brown slacks, a beige shirt, brown tie, and a brown checkered sports coat (Tr. 231). She then identified the belt and sports coat her husband had been wearing and a lighter he had been carrying.

The State next called Harlan Knight. He testified that he pleaded guilty in 1976 to a charge of robbing Earl Bell by force and fear. It was part of the agreement to enter that plea of guilty that he testify at this trial (Tr. 246). He stated that he knew the defendant well and that they had grown up together.

He testified that defendant came by his house, in a white Oldsmobile, around 7:00 or 8:00 p.m. on March 30th. They

went for a ride and approximately 40 minutes later parked in a parking lot located across the street from the Picadilly Cafeteria. He said that after sitting and talking for a brief period of time defendant suddenly jumped out of the car and said, "We're going to take this man," (Tr. 249). This witness then identified the sport's jacket (State's Exhibit #4) as the clothing the man had been wearing.

After getting Earl Bell into the car they drove to Reservoir Hill where defendant told Bell to get in the trunk (Tr. 251). Knight took $25.30 from Bell's wallet at this time (Tr. 264). They then left for defendant's residence at Comanche Apartments. On the way they were stopped by a man who informed them that their tail lights were inoperative. Upon arriving at the apartments, they checked the wiring to the tail lights and then went inside. Defendant was then asked to call his brother so that he might take this witness home. Harlan Knight further testified that defendant phoned the Picadilly Cafeteria, "to get the manager's telephone number," and a Dennis someboody (Tr. 256). They then returned to the Oldsmobile to try to get the combination of the cafeteria safe out of Bell. Knight stated that when Bell said he didn't know the combination defendant became angry and grabbed the jack handle and began beating Bell with it. He said Bell experienced intense pain and began telling them the combination and said, "Just forget the number. I'm going to try to get the $20,000," (Tr. 257).

They went back inside the apartment to wait on defendant's brother. During the wait, defendant went to a closet and removed a rifle, stating, "This is in case I don't have any witnesses." (Tr. 257). They then returned to the car in order to tie Bell up. Defendant cut Bell's clothes off and tied him up with nylon cord and taped his mouth shut.

They again returned to the apartment and defendant's brother, William Johnson, arrived shortly thereafter. At that time William was informed about Bell and they then left in William's car to take this witness home. This witness further testified that he left for Baxter Springs, Kansas at approximately 8:30 a.m. March 31st, in order to visit some relatives and friends. He stated that he arrived back in Tulsa at 3:00 a.m. the morning of April 1st and that the Tulsa police were waiting for him.

The State next called William Marcell Johnson. Mr. Johnson was not able to be subpoened so his testimony was read to the jury. He is the brother of the defendant and sometimes is referred to by the nickname "Peanuts" (Tr. 281). His testimony showed that he received a phone call from defendant at approximately 11:00 p.m. on the night in question wherein defendant requested the use of his car. Upon arriving at the Commanche Apartments, he went inside where he found defendant, defendant's wife, and Harlan Knight. They (defendant and Knight) told him to come outside and they went to defendant's Oldsmobile where defendant unlocked the trunk revealing Earl Bell (Tr. 290). Defendant stated that "he was a man from Picadilly,"

(Tr. 291), and that defendant was trying to get $20,000 from him (Tr. 292).

This witness further testified that to the best of his knowledge he didn't think the Oldsmobile, with Earl Bell tied up in the trunk, was moved until approximately 4:00 p.m., March 31st, when he observed defendant, Dewayne "Duck" Mayfield, and one other black man driving out of the apartment parking lot (Tr. 298). He stated that his brother was arrested that night and that he received a phone call from the defendant in jail the following day, April 1st. Testimony relating to the contents of that call were:

> "He told me to go find Duck, so I told him I didn't know where Duck stayed at, and so he told me to go find my cousin; told me if Douglas is any kind of a cousin, he will go try to find the body and move it because if he don't if they find the body, he will go to the chair." (Tr. 304, 338-339).

He also stated that, two days prior to the abduction, defendant told him that he was contemplating robbing the Picadilly Cafeteria (Tr. 340). Additionally, he stated that defendant kept a .22 caliber automatic rifle in the closet of the apartment (Tr. 288).

Tulsa police officer C. W. Jordan was the next witness to testify for the State. Officer Jordan was assigned to the surveillance unit of the drop site located by the Vernon Manor Apartments. At 2:00 a.m. on March 31st he observed a black man arrive in an autombile similar to the vehicle in State's Exhibit No. 6. The man, however, aborted his attempt to recover the money. Officer Jordan stated that

he returned to the police station at 3:00 a.m. to assist in an interview of a suspect and found that this suspect (the defendant) was dressed in the same hat and coat as the man at the drop site.

Tulsa police detective Max Sharp next testified that he arrived at the Bell residence around midnight of March 30th. He said that he listened in on a telephone call in which a young negro male demanded $20,000 from her (Celia) or he would kill her father (Tr. 363).

Tulsa police officer Carroll E. Gatlin stated that he was part of the helicopter surveillance team on March 31st. He saw no one attempt to pick up the money at the drop site. Subsequently, he went to the Picadilly Cafeteria to get a roster of present and past employees and then returned to the police station. The roster was then searched for the name "William Lee" which was mentioned on one of the recorded telephone conversations between the Bells and the defendant. The list contained the name William Lee Lindley, who at that time was wanted on two misdemeanor warrants. Lindley was brought to the station where he identified the voice of Kurk Kendall Johnson, the defendant, on the tape recorder (Tr. 376). A check of police records revealed that the defendant was also wanted on a misdemeanor warrant. As a result, several officers proceeded to defendant's apartment to arrest him. Officer Gatlin testified that he and Sergeant Putnam got the Oldsmobile keys from Adrian Knowles, defendant's wife, and looked in its trunk. This

witness stated:

> When we opened the trunk, there was a rifle lying right inside the trunk, there was a crowbar lying in the trunk, and there were indentations from inside the trunk, the approximate size of the tire tool or crowbar I just described -- it's a single tire iron, is what it is. There were inside indentations inside the trunk along the metal and there was a couple of buttons lying in the floor of the trunk." (Tr. 390)

Earl Bell was not found in the trunk (Tr. 394).

Tulsa police officer, Howard Hadley, testified that on April 2, 1975, he conducted a serach for the body of Earl Bell (Tr. 401). He discovered the lifeless body at 8:02 A.M. at a point 2.2 miles north of 57th West Avenue and Edison in Tulsa (Tr. 402).

Roy Goodenough, also a Tulsa police officer, testified that he arrived at the scene where the body was found at approximately 8:30 A.M. He took photographs of the scene, the victim, and the bullet cartridges (Tr. 408). The cartridges were found within six feet of the body. He stated that he also photographed the trunk of the Oldsmobile and searched the car for fingerprints.

J.R. Brown next testified that he was also a Tulsa police officer. He said that on March 31, 1975, he went to the Bell residence at approximately 8:15 A.M. At that time he installed a phone recorder on the Bell telephone. He also recovered from William Johnson a cigarette lighter matching the description of Earl Bell's (Tr. 420). He further stated that he went to the Commanche Apartments on April 2nd where a nearby pond was drained which led to the recovery of a brown leather belt which had the imprinted initials of J.R.B. (Tr. 422).

Tulsa police officer, Bill Putnam, testified that he accompanied Officers Gatlin and Been to the Commanche Apartments on March 31st to serve the warrant on the defendant. He stated that due to the circumstances involved, he requested and received permission from defendant's wife Adria to search the Oldsmobile (Tr. 425-426). The rifle and the tire tool were again noted.

The State next called Police Lieutenant Tom Llewellyn who testified that he photographed and examined the trunk of the Oldsmobile. He stated that the initials present on the .22 caliber rifle were his and that this rifle was removed from the Oldsmobile trunk (Tr. 438). He stated that he recovered one brown cotton sock from the trunk and a matching sock from the murder scene (Tr. 441, 445-446). Other testimony related to the recovery of other articles of clothing and to evidence recovered from the autopsy.

The State's next witness was Dr. Robert Fogel, the pathologist who performed the autopsy on Earl Bell. He testified that he performed the autopsy at 3:00 P.M. on April 2, 1975, and that it was his opinion Earl Bell had been dead 24 to 48 hours (Tr. 468). He believed the cause of death to be a "direct result of the bullet wound of the left occipital region", and that "it resulted in major destruction of the brain and hemorrhage within the cranium" (Tr. 469). It was also his opinion that the bullet fragments removed from the body were of .22 caliber (Tr. 473).

The State's final witness was Robert W. Siebert, a special agent with the FBI. The Court found Mr. Siebert to be an expert in the field of firearms identification. He testified that his examination of one bullet fragment removed from Bell's body revealed that it was fired from a ".22 long rifle caliber" (Tr. 488). He further stated, "On the basis of these observations, I was able to determine that the submitted bullet could have been fired by the submitted rifle" (Tr. 490).

Additional examinations of the bullet casings resulted in this witness' conclusion that the bullets found in Bell's body were fired from the rifle found in the Oldsmobile's trunk (Tr. 493).

The State rested.

The Defense presented only two exhibits, the first a stipulation concerning the non-conclusiveness of FBI laboratory comparisons of recorded voices, and the second, a stipulation that defendant was tried, convicted, and was sentenced to sixty (60) years in prison for the kidnapping of Earl Bell.

PROPOSITION I

DEFENDANT WAS NOT TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

Defendant first alleges that the trial court erred in overruling his plea of former jeopardy. Defendant asserts that the offenses charged against him, to-wit: kidnapping and murder, constitute one transaction and thus, one crime,

thereby barring this conviction by virtue of his previous conviction for kidnapping. See Johnson v. State, Okl. Cr. 564 P.2d 641 (1977), 554 P.2d 51 (1976).

It is well recognized that the Fifth Amendment to the Constitution of the United States guarantees against double jeopardy for a single offense. Oklahoma provides that same guarantee via 22 O.S. 1971 §§14, 522 and Art. II, §21 of its Constitution. Each of the above noted provisions, however, speak in terms of "the same offense" or "offenses necessarily included therein". This Court stated in Collins v. State, 70 Okl. Cr. 340, 106 P.2d 273 (1940) at Page 277:

> "The prohibition of the common law and of the constitution is against a second jeopardy for the same offense, that is for the identical act and crime; or as expressed in a number of cases, to entitle a defendant to plead successfully former jeopardy, the offenses charged in the two prosecutions must be the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments are perfectly distinct in point of law, however nearly they may be connected in point of fact. It is not necessarily decisive that the two offenses may have some material fact or element in common, or that they are similar, where they are not in fact the same. The test is not whether defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." (Emphasis added)

It can therefore be seen that the guarantees against double jeopardy are not an impediment to Congress, or to State Legislatures, to make separately punishable each step leading to the consummation of a prohibited transaction. Gilmore v. United States, 124 F.2d 537 (10th Cir. 1942).

This Court set forth the applicable test to determine if double jeopardy exists in Draper v. State, Okl. Cr. 562 P.2d 155, 167 (1977):

> "'For a double jeopardy claim to be viable, it must be shown that the two offenses charged are in law and in fact the same offense. * * * Offenses are not the same if, upon the trial of one, proof of an addition fact is required that is not necessary to be proved in the trial of the other, although the same acts may be necessary to be proved in the trial of each.'"

Collins v. State, supra at 277, further stated:

> "When a single transaction constitutes two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on the second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second."

The ultimate test, therefore, concerns the identity of offenses. It is not necessarily decisive that the two offenses may have material facts in common. Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932); Draper v. State, supra; Bogue v. State, Okl. Cr., 556 P.2d 272 (1976); Hill v. State, Okl. Cr., 511 P.2d 604 (1973); Stockton v. State, Okl. Cr., 509 P.2d 153 (1973); Thacker v. State, Okl. Cr. 312 P.2d 167 (1957); Beachum v. United States, 218 F.2d 528 (10th Cir. 1955); and Robinson v. United States, 143 F.2d 276 (10th Cir. 1944).

It is readily apparent that kidnapping for extortion and murder in the second degree are separate and distinct offenses. Each requires the proof of a fact which the other does not. Robinson v. United States, supra. Each is subject to a separate and distinct penalty. See 21 O.S. §§ 693, 701 and 707 relating to murder and 21 O.S. §745 relating to kidnapping for the purpose of extortion.

It is also readily apparent that the crime of murder was committed to conceal defendant's first crime of kidnapping. It was stated by this Court in Collins v. State, supra, that such a situation is not unusual.

> "It is not uncommon for persons who have violated the law . . . to go ahead and commit further crimes in an endeavor to conceal or escape from the first offense." 106 P.2d at 278.

From the foregoing, it can be seen that the proof necessary to convict on the kidnapping charge would not necessarily convict on the murder charge. The charges are composed of entirely different elements. To hold otherwise would encourage criminals to commit further crimes in order to conceal or escape from their first criminal act. Should such second or further act be unsuccessful, it would allow them to raise a claim of former jeopardy and escape punishment for what is often a more serious and heinous offense.

PROPOSITION II

DEFENDANT'S MOTION TO SUPPRESS WAS PROPERLY OVERRULED.

For his second assignment of error, the defendant alleges that the trial court erred in failing to sustain defendant's motion to suppress items obtained during the search of the trunk of defendant's automobile. The defendant argues that this was a warrantless search without probable cause and that if there was probable cause there was ample time for the officers to have obtained a search warrant.

The issue raised in this proposition is identical to that presented in an appeal by this defendant of his conviction for the kidnapping of Earl Bell. Accordingly, this Court's opinion in Johnson v. State, Okl. Cr. 554. P.2d 51 (1976) is determinative of this issue.

Further, the record affirmitively indicates that the consent given by defendant's wife was sufficient to render the warrantless search constitutional. Riggle & Cotton v. State, Okl. Cr., ____ P.2d ____, 49 O.B.A.J. 2112 (1978); Rutledge v. State, Okl. Cr., 545 P.2d 1257 (1976). At Page 426 of the transcript, Police Officer Bill Putnam testified:

> "The arrest was made and present at the time was his wife, Adria, and due to circumstances involved, I asked her for permission to search a car parked in front of the apartment. She gave me a set of keys and we checked the trunk . ."

The record is devoid of any showing that defendant's wife was coerced. Also absent is any showing that the Oldsmobile was not under their joint possession or control. Burkham v. State, Okl. Cr., 538 P.2d 1121 (1975) held at Page 1124:

> "Put simply, the rule to be followed in Oklahoma is as follows: In the absence of fraud or express or implied coercion, an affirmative consent to search, given freely and voluntarily by one's spouse, may be used to justify a warrantless search and render its fruits admissible against the absent, nonconsenting spouse, except as to areas and property personal to the nonconsenting spouse and not under joint possession or control."

PROPOSITION III

THE VERDICT FORMS WERE PROPER.

Defendant's third assignment of error alleges that the verdict and judgment are not sustained by sufficient legal evidence and are contrary to law.

In response to the first part of Defendant's allegation concerning the legality of the evidence seized in the search of defendant's vehicle, the State directs the Court to Proposition II of this brief.

The second part of Defendant's allegation states that the verdict forms, to-wit: "guilty" or "not-guilty", deprived him of due process of law in that they placed upon the jury a duty which the defendant is not required to meet. Defendant argues that the jury does not have to find him "not guilty" but only has to have a reasonable doubt regarding his guilt.

The State agrees with the proposition that the jury need only have a reasonable doubt regarding defendant's guilt to acquit him of the crime charged. But, the State disagrees with defendant's allegation that he was deprived of his constitutional right to due process of law.

Title 22 O.S. 1971, §914 sets forth the form for verdicts in criminal cases. It states:

> "A general verdict upon a plea of not-guilty, is either 'guilty', or 'not-guilty' which imports a conviction or acquittal of the offense charged."

The jury instructions, specifically numbers 1,3,4,5,8 and 10, were more than sufficient to instruct the jury of the State's burden to prove defendant's guilty "beyond a reasonable doubt". (O.R. 151-165)

PROPOSITION IV

AT MOST, ANY PREJUDICIAL COMMENT WAS MERELY HARMLESS ERROR.

Defendant's final assertion alleges that the State's closing argument was prejudicial in that it was an attempt to infame the passions of the jury. The alleged prejudicial comment occurred at page 514 of the transcript:

> "The next call that we know he [defendant] made after that was to Peanuts. Peanuts didn't want to have to come up here and say it again, but you heard his prior recorded testimony of it. Kurk called him from the jail. 'Find Duck. Find Duck. Tell him if he is any kind of cousin, he will find that body and get rid of it because if he don't, I'll get the electric chair.' They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body, I'll get the electric chair.' If there is any person whoever derserved it, he is sitting right in front of you, right there.
>
> MR. HESKETT: Excuse me, Your Honor. Do I understand counsel to be pleading for the electric chair? It's improper punishment.
>
> THE COURT: Overruled.
>
> MR. HESKETT: Note our exception.
>
> MR. PACENZA: But the Court has instructed you that you can't do it and I'm asking you to follow the law. You may feel that the punishment that you can assess in this case is insignificant compared to what he did. Stripped a man of his clothes, his dignity, tied his hands so tight that there were indentations in his flesh; stopped by a small creek, threw him on the ground and shot him through the head.
>
> You will get a form of verdict in this case and that form of verdict will tell you that if you find him guilty, you must assess a punishment of indeterminate sentence of ten years to life. Insignificant for what he did; insignificant for what he deserves. I ask you now to do your duty. Thank you."

The State maintains that the alleged wrongful comment, when examined in context, cannot be deemed to be prejudicial to the defendant.

Assuming arguendo, that such comment was unfair, it was at most harmless error. 20 O.S. 1971 §3001. Title 21 O.S. 1976 §701.9(b) provides that:

> "B. A person who is convicted of or pleads guilty or nolo contendre to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years, nor more than life."

Any statement no matter how prejudicial could not have affected the defendant's substantive rights. After determing the defendant's guilt, the jury was bound to assess as punishment an indeterminate sentence of ten (10) years to life. The same sentence would have been assessed absent any comment by the District Attorney.

CONCLUSION

Appellant's contentions have been answered by both argument and citatiors of authority. The State urges no error occurred which would require modification, reversal, or dismissal and, therefore, respectfully submits the Judgment and Sentence be affirmed.

Respectfully submitted,

JAN ERIC CARTWRIGHT
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CERTIFICATE OF MAILING

On this 9th day of February, 1979, a true and correct copy of the above was mailed, postage prepaid, to: Mr. Bill Heskett, Heskett, Heskett, Daniel and Esser, 304 First National Bank Building, Pawhuska, Oklahoma 74056.

Timothy S. Frets

TIMOTHY S. FRETS

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 14 day of Feb. 19 79

Clerk

By Audrey Lillard DEPUTY

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 21 1979
Ross N. Lillard, Jr.
CLERK

No. F-78-516

IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

KURK KENDALL JOHNSON, Appellant,

vs.

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REPLY BRIEF OF APPELLANT

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AUTHORITIES

	Pages
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Title 22, § 836	6
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IN THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA

No. F-78-516

KURK KENDALL JOHNSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

REPLY BRIEF OF APPELLANT

The appellant, Kurk Kendall Johnson, hereinafter called Johnson, files this brief in reply to the answer brief filed herein by the State of Oklahoma on the 9th day of February, 1979.

I. Error of the Trial Court in Overruling Appellant's Pro Se Writ of Habeas Corpus and the Motion to Dismiss (Second) Plea of Former Jeopardy.

The writer of the State's answer brief does not comment upon what the Supreme Court meant in Johnson vs. Hampton, District Judge, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364, when it ordered that this matter proceed in light of Brown vs. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221,

and Harris vs. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912. The Court's attention is respectfully directed to Johnson's brief herein, pages 5 through 11.

In his brief, Johnson draws this Court's attention to the Supreme Court's language in Harris, supra, and in Brown vs. Ohio, supra. Further, he specifically drew the Court's attention to the Supreme Court's footnote in Brown vs. Ohio, supra, wherein the Supreme Court set forth distinctions to the Blockburger Test [Blockburger vs. Untied States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180] and discussed at length in In Re Nielson, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672. Clearly, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case is identical. And in the words of the Supreme Court in Nielson, supra, the defendant was forced by the State to "run the gantlet" a second time.

The Court should follow the "due process" standards of the Supreme Court and distinguish the Blockburger Test from the case before the Court. While the offenses are different, the evidence was the same, as was the transaction. The Court should, like England, Johnson respectfully submits, adopt a clear constitutional standard and forbid an "ordeal" such as the one now before the bar. See Connelly vs. D.P.P., AC 1254; and also the opinions of Justices Brennan, Douglas and Marshall

in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 481, 90 S.Ct. 1189, Brown vs. Ohio, supra, and Thompson vs. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768.

II. Error of the Court in Overruling the Appellant's Motion to Suppress and His Demurrer to the Evidence.

The State's entire answer to Johnson's proposition is that Adria Knowles was Johnson's wife and that she, as such, gave consent to search Johnson's vehicle. While witness Putnam called her Johnson's wife, as did other witnesses, the State's witnesses and indeed the District Attorney William Hall referred to her as Adria Knowles. See Trial Tr., p. 426; Preliminary Tr., 154, 158, 161 and 166. In addition, the State subpoenaed Adria Knowles, not Adria Johnson. See Dist. Ct. File. Under the law, mere assertions do not make the witnesses' conclusions fact.

It is well established that where a party's right to the relief sought is dependent upon the existence of a so-called common law marriage, the burden is upon such party to establish the facts essential to constitute the marriage. See Jackson vs. Jackson, 182 Okla. 74, 76 P.2d 1062; Impson vs. Kelley, 195 Okla. 666, 163 P.2d 984; In Re Rainey's Estate, 203 Okla. 401, 222 P.2d 510; and Hawkins vs. Hithcock, Okla., 365 P.2d 971. Therefore, the State would be required to establish that Adria

Knowles and Johnson had a mutual intention to consummate marriage, that they cohabitated together as husband and wife and that they held themselves out as husband and wife, in order for it to prove a common law marriage. See Thomas vs. James, 69 Okla. 285, 171 Pac. 608; Vann vs. Vann, 186 Okla. 42, 96 P.2d 76; and Rowland vs. State, 75 Okla. Cr. 164, 129 P.2d 609.

A meretricious relationship of a man and woman without all the elements of a "common law marriage" will not make a marriage. Witnesses merely calling parties husband and wife do not make it so, especially when same is merely based upon a conclusion. See Nichols vs. State, 50 Okla. Cr. 409, 298 Pac. 886. The State did not attempt to prove the elements of a common law marriage and the duty would have clearly been upon it. Further, in neither the kidnapping case in Tulsa County nor in the trial court in the instant matter did the State even suggest such an argument.

Johnson respectfully requests that the Court carefully consider his brief and the matters therein set forth. Obviously, the evidence in the instant case clearly discloses that the officers knew Bell was not in the trunk of the automobile and that there was no "emergency at hand." The evidence in this matter is distinguishable from the evidence in Johnson vs. State, Okla. Cr., 554 P.2d 51.

Clearly, the police officers, under the evidence in this case, made an unconstitutional search. The motion to suppress should have been sustained.

III. That the Verdict and Judgment are not Sustained by Sufficient Legal Evidence and are Contrary to Law.

Johnson's further argument in this proposition is that the verdict is not in proper form notwithstanding that it is the customary form in most, if not all, criminal proceedings in the State. The form of the verdict gave the jury two alternatives: (1) guilty or (2) not guilty. Same places a duty upon the jury that defendant is not required to meet in that if the jury has a reasonable doubt of guilt the jury should find for Johnson and against the State.

It is conceeded by Johnson that the form did comply with Title 22, Section 914 of the Oklahoma Statutes. However, Johnson would hasten to add that it is not the Legislature that sets the constitutional standards but the Constitution and the courts interpreting it.

The Supreme Court of the United States in Leland vs. Oregon, 343 U.S. 790, 96 L.Ed. 1302, 1309, 72 S.Ct. 396, stated:

> "The fact that a practice is followed by a large number of states is not con-

> clusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

Justice Black in Rochin vs. California, 342 U.S. 165, 96 L.Ed. 183, 192, 72 S.Ct. 205, 25 A.L.R.2d 1396, stated that a test of what are immutabel and fundamental principles of justice should not necessarily be confined only to the notions of English-speaking peoples. The test should be what is fundamentally fair.

In a dissent by Justices Frankfurther and Black in Leland vs. Oregon, supra, they stated:

> "The State cannot be relieved, on a final showdown, from proving its accusation. To prove the accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability." [Emphasis added.]

It is fundamental law that a jury must be convinced of guilt "beyond a reasonable doubt" before it can legally return a verdict of guilty. See 21 Okla. Stat. § 693; 22 Okla. Stat. § 836; Rea vs. State, 3 Okla. Cr. 269, 105 Pac. 381;

Bryan vs. State, 11 Okla. Cr. 180, 144 Pac. 392; Allison vs. State, 11 Okla. Cr. 508, 148 Pac. 824; Nicholson vs. State, 13 Okla. Cr. 123, 162 Pac. 447; Lancaster vs. State, 13 Okla. Cr. 429, 164 Pac. 1152; Mahaffey vs. State, 51 Okla. Cr. 100, 299 Pac. 927; and Slaton vs. State, 97 Okla. Cr. 12, 257 P.2d 330; to cite only a few such holdings. Further, the Supreme Court in Brinegar vs. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, held that the rules of evidence and procedure must be consistent with the standard that guilt in a criminal case must be proved beyond a reasonable doubt.

Notwithstanding the foregoing body of both statutory law and case law, the form of the verdict would require the jury to find Johnson "not guilty." Obviously, this is a far different criteria than entertaining an honest reasonable doubt of guilt.

Johnson respectfully submits that where a procedure lacks due process and places a burden on a defendant which is greater than the law would require or demand, then and in that event, it cannot be cured by legislative directives or the passage of time.

IV. That the Closing Argument of the State was Irregular and Contrary to the Law.

In closing argument the prosecutor said:

> "If there is any person whoever deserved it [the electric chair], he is sitting right in front of you, right there."

The State maintains that notwithstanding the "electric chair" or death sentence could not be applied under the law in this case, the prosecutor's comment, when examined in context, cannot be deemed to be prejudicial to Johnson. The State then goes on to quote the balance of the argument. The conclusion of which is:

> "* * * you must assess a punishment of indeterminate sentence of ten years to life. Insignificant for what he did; insignificant for what he deserves. I ask you now to do your duty. Thank you." [Emphasis added.]

In both instances, the State's attorney was expressing his opinion of guilt. Johnson's objection was overruled and no admontion was given the jury. See Holleman vs. State, 74 Okla. Cr. 258, 125 P.2d 239.

The prosecutor's argument in this regard is clearly unethical. See American Bar Association's Standards Relating to the Prosecution Function, § 5.8(b). This Court in the recent case of Cooper vs. State, Okla. Cr., 585 P.2d 234, held that such conduct is error.

The prosecutor was in effect saying:

> "Johnson is guilty and the punishment allowed by law is 'insufficient.' He should be put to death."

Regardless so goes the State's argument, the comment was "at most harmless error." The author of the State's answer brief asserts, "The same sentence would have been assessed absent any comment by the District Attorney."

If the Court would condone the State's argument in this regard then a prosecutor could say whatever, and so long as there was no discretion for the jury as to sentence, there would be no error. Under such a theory, the prosecutor could have said:

> "This Nigger is guilty. He should be tied-up, thrown in a ditch and shot to death."

Clearly, this Court would not tolerate such comment or conduct. However, it does point out the faulty reasoning of the State's brief.

The prosecutor was concluding his comments. His comments were an effort to substitute his opinion for that of the considered decision of the jury; to appeal to their passion; to prejudice their minds in the deliberative process.

In terms of transactional psychology, the prosecutor effectively let his prejudged and biased opinion be imposed

upon the minds of the jury. He was playing the role of "parent" and they were made "children." See Harris, I'm OK, You're OK, pp. 38-59. Without the trial court's admonition, a situation such as this is extremely dangerous!

Unfair comment without admonition of the trial court, creates a risk that goes to the very heart of the trial "guilty" or whether there is, in fact, a reasonable doubt of guilt. This Court has held that where the result of a comment would inflame the minds of a jury, and the trial court failed to admonish the jury not to consider the matter, same was reversible error. See Pebworth vs. State, 88 Okla. Cr. 97, 199 P.2d 621.

CONCLUSION

In conclusion, Johnson would respectfully urge the Court to consider the matters herein as same fully respond to the State's answer brief. Further Johnson would again urge those matters set forth in his brief herein, together with the conclusions therein set out.

Wherefore, Johnson prays the Court to reverse the judgment and conviction herein and to order the District Court to proceed no further with him having to continue this trial by "ordeal."

Respectfully submitted,

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify and declare that on the 19th day of February, 1979, I mailed a true and correct copy of the foregoing Reply Brief of Appellant to the Honorable Jan Eric Cartwright, Attorney General, State Capitol, 2302 Lincoln Blvd., Oklahoma City, Oklahoma 73105; and to the Honorable Larry D. Stuart, District Attorney, County Courthouse, Pawhuska, Oklahoma 74056, with postage thereon fully prepaid.

Bill Heskett

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Brief in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 26 day of July 19 80.

Clerk

By [signature] DEPUTY

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 6 1979
Ross N. Lillard, Jr.
CLERK

TO: ROSS N. LILLARD JR., CLERK
COURT OF CRIMINAL APPEALS

ORDER SUBMITTING CAUSES

IT IS HEREBY ORDERED that the following causes are submitted this 6th day of March, 1979, in accordance with the Rules of this Court:

F-77-696 GENE KAVIN STARR V. STATE OF OKLAHOMA

M-78-225 DAVID L. WARWICK V. STATE OF OKLAHOMA

C-78-260 DALE ERWIN LANG V. STATE OF OKLAHOMA

F-78-307 ARDIE LOUIS ROBERTS V. STATE OF OKLAHOMA

F-78-396 REFORD D. JOHNSON V. STATE OF OKLAHOMA

F-78-403 STEVE CARTER V. STATE OF OKLAHOMA

~~F-78-425 KYLE HUNTER [illegible] V. STATE OF OKLAHOMA~~

F-78-433 BILLY JOE CHUCULATE V. STATE OF OKLAHOMA

F-78-465 LEWIS AARON BOWEN V. STATE OF OKLAHOMA

F-78-516 KURK KENDALL JOHNSON V. STATE OF OKLAHOMA

F-78-526 WALTER LEE TOLE V. STATE OF OKLAHOMA

F-78-542 RONALD GENE SMITH V. STATE OF OKLAHOMA

F-78-544 DALE EUGENE GILL V. STATE OF OKLAHOMA

F-78-626 GARRELL MOORE V. STATE OF OKLAHOMA

F-78-662 GARY L. JAMES V. STATE OF OKLAHOMA

~~C-78-679 [illegible] V. STATE OF OKLAHOMA~~

F-79-8 EDDIE COUTS V. STATE OF OKLAHOMA

C-79-46 CHARLES FRANK TAHSEQUAH V. STATE OF OKLAHOMA

WITNESS MY HAND, and the Seal of this Court, this 6th day of March, 1979.

TOM R. CORNISH, PRESIDING JUDGE

ATTEST:

Ross N. Lillard Jr.
CLERK

Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 6th day of March, 1979.

Clerk

By [illegible] DEPUTY

A-7

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 21 1980
Ross N. Liliard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FOR PUBLICATION

KURK KENDALL JOHNSON,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. F-78-516

AUTHORIZED FOR FILING
MAY 21 1980
COURT OF CRIMINAL APPEALS

- O P I N I O N -

CORNISH, Presiding Judge:

The appellant was arrested on March 31, 1975, for the kidnapping of Earl Edward Bell. The authorities later discovered that Bell had been murdered. Because it appeared that the abduction occurred in Tulsa County, the appellant was charged in the Tulsa County District Court, Case No. CRF-75-690, with the crime of Kidnapping for the Purpose of Extortion. He was also charged with the crime of First Degree Murder in the District Court of Osage County, Case No. CRF-75-294, where the body was found.

Preliminary hearings were held and the appellant was bound over on both charges. On September 3, 1975, the appellant moved for a continuance of the murder trial in Osage County until after the conclusion of the Tulsa County trial on the kidnapping charge. The motion was granted. On September 5, 1975, the appellant was convicted by a Tulsa County District Court jury of Kidnapping for the Purpose of Extortion. He was sentenced to sixty (60) years' confinement. On appeal this Court affirmed the conviction. See Johnson v. State, Okl.Cr., 554 P.2d 51 (1976), cert. denied, 429 U.S. 943, 97 S.Ct. 364, 50 L.Ed.2d 314 (1976). Thereafter, the appellant was convicted of Murder in the Second Degree in the District Court of Osage County. Punishment was fixed at ten (10) years to life imprisonment.

I

In this appeal of his murder conviction, the appellant raises the issue of double jeopardy. He argues that the murder and

the kidnapping were parts of a single criminal episode and that, therefore, the kidnapping conviction barred the murder trial.

A

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the appellant entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the crime of kidnapping from the information for first degree murder. The motion was denied. The appellant then petitioned this Court for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. This Court, in a per curiam opinion, denied the writ, stating:

> ". . . No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. Williams v. State, Okl.Cr., 321 P.2d 990 (1957), Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959)." Johnson v. Hampton, Okl.Cr., 564 P.2d 641 (1977), 11 A.L.R.3d 840 (Supp. 1979)[1]

The United States Supreme Court granted certiorari, vacated this Court's order denying the writ of mandamus, and remanded for further consideration with particular attention to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See Johnson v. Hampton, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand this Court held that the crime of first degree murder, as charged, necessarily included the lesser offense of kidnapping for the purpose of extortion. We prohibited the trial of the appellant as originally charged, but further stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in Brown v. Ohio, and Harris v. Oklahoma, supra." Johnson v. Hampton, Okl.Cr., 572 P.2d 1301 (1978).

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[1]For cases from other jurisdictions, see Annot. "Earlier Prosecution for Offenses During which Homicide was Committed as Bar to Prosecution for Homicide." 11 A.L.R.3d 834 (1967).

Subsequently, over the appellant's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

B

The first assertion of error is the trial court's denial of the appellant's renewed motion to dismiss based on the plea of double jeopardy. The appellant urges us to apply the rule sometimes referred to as the "same transaction test." Under that rule a person cannot be held to answer for separate crimes at consecutive trials when the separate crimes were parts of a single criminal episode.

Generally, as noted in Gowler v. State, Okl.Cr., 589 P.2d 682 (1979), in determining the viability of a double jeopardy claim, the courts have utilized two tests referred to as (1) the "same evidence test" and (2) the "same transaction test," or a variation of the two. The "same evidence test" was initially employed in the English case of Rex v. Vandercomb and Abbott, 2 Leach 707, 168 Eng.Rep. 455 (1796). Morey v. Commonwealth, 108 Mass. 433 (1871), stated the rule in the first case to apply the rule in this country:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction or sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Traditionally, the test employed to determine whether a person has been placed in jeopardy twice for a single offense has been to ask whether each of the offenses charged requires proof of an additional fact that is not necessary to the other. Thus, a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy, even though each offense may arise from the same act or criminal episode. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Collins v. State, 70 Okl.Cr. 340, 106 P.2d 273 (1940).

We find no consistent solution to the problem in examining prior cases from this Court. The same is true when we look to other

jurisdictions. The United States Supreme Court has not said any one test is required by the Fifth Amendment.

Extensive research on this question indicates that the "same evidence test" is utilized by a majority of state and federal courts.[2] However, the problem is that with the proliferation of separately defined substantive crimes by the state legislatures the number of substantive offenses that may arise from a single criminal transaction has increased markedly. Thus, mechanical application of the "same evidence test" results in a decrease in the double jeopardy protection.

Critics of the same evidence test include in their ranks current members of the United States Supreme Court. In Ashe v. Swenson, 397 U.S. 436, 451, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion in which Justices Douglas and Marshall joined, made a scathing attack upon the same evidence test, finding that it "virtually annuls the constitutional guarantee." He further said:

> ". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." (Citations omitted, footnotes omitted)

Other critics and modern writers maintain that the proper test to determine whether a person has been twice placed in jeopardy for a single offense is to ask whether the offenses charged were parts of the same criminal act, occurrence, episode or transaction.[3] If the

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[2]Twice in Jeopardy, 75 Yale L.J. 262 (1965).

[3]Note, Criminal Law: The Same Offense in Oklahoma -- Now You See it, Now You Don't, 28 Okl.L.Rev. 131 (1975); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, 435, 436 (1973); State v. Brown, 497 P.2d 1191 (Or. 1972); Noe, Criminal Law-Double Jeopardy -Should "Offense" be Defined in Terms of Substantive Law?, 38 Mo.L.Rev. 528, 530 (1973); Note, The Protection Against Multiple Trials, 11 Stan.L.Rev. 735 (1958).

answer is in the affirmative, then multiple prosecutions or punishments should be barred by the Double Jeopardy Clause. It is urged that the "same transaction test," by consolidating in one lawsuit all issues arising out of a single transaction, best promotes justice, economy and convenience.

The "same transaction test" has been adopted in some states by statute.[4] A few states have adopted the test by court decision.[5] It is also interesting to note that in England, where the "same evidence test" derived, the House of Lords indicated in 1964 that joinder of offenses arising out of the same transaction would be required in the future. Connelly v. Director of Public Prosecutions, A.C. 1254 (1964).

We would also point out that the "same transaction test" as viewed by Justice Brennan does not necessarily preclude a defendant from being convicted and punished for each offense joined. Abbate v. United States, 359 U.S. 187, 198, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). Thus, it is possible to apply the "same transaction test" to determine when offenses should be joined, yet apply the "same evidence test" to determine whether the defendant can be subjected to separate convictions and punishments for the offenses joined. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), n. 5.

Utilizing this test, this Court has held that separate crimes were in fact committed when two or more crimes were committed within the same brief span of time. Starnes v. State, Okl.Cr., 507 P.2d 920 (1973). Also, where crimes against separate and distinct persons were involved, we have held that, even though the crimes were a part of one criminal episode and were similar in nature, prosecution for each separate offense was not barred. Jennings v. State, Okl.Cr., 506 P.2d 931 (1973).

C

Much of the confusion surrounding the double jeopardy concept arises from the injustice of applying either test, to the

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[4] See N.Y.Crim.Proc.L. 40.20(2); 40 Minn.Stats.Anno. 609.035

[5] State v. Ahuna, 52 Hawaii 321, 474 P.2d 704 (1970).

exclusion of the other, in all cases. In this regard, it must be recognized that the Double Jeopardy Clauses of our State and Federal Constitutions are intended to protect against two distinct abuses. The first is requiring an accused to endure a series of trials where the same offense is charged; the second of these is the infliction of multiple punishments for a single offense. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A clear understanding of these distinct functions of the Double Jeopardy Doctrine makes clear the undesirability of adopting either the "same evidence test" or the "same transaction test" to the exclusion of the other. An analysis of past decisions of this Court reveal what we believe to be a proper working relationship between the two tests.

In the case of Starnes v. State, supra, the defendant was charged with robbery by force and attempted rape, with both offenses arising out of one criminal episode. He pleaded guilty to both charges, and concurrent sentences were imposed. On appeal, the defendant contended that the offenses arose out of the same event and that, therefore, it was error to convict the defendant of two separate offenses. The aspect of double jeopardy involved in Starnes was the protection against multiple punishments for a single offense. In upholding the imposition of separate punishments, this Court employed the "same evidence test," finding that the robbery and the attempted rape were two separate and distinct offenses, consisting of different elements. Application of the "same evidence test" under the facts of Starnes does not, however, necessarily imply that the "same transaction test" cannot be applied to other factual circumstances.

In Lawson v. State, Okl.Cr., 484 P.2d 900 (1971), the defendant broke into the victim's home with the intent to commit larceny. When confronted inside the home, he robbed the victim at gunpoint. The defendant was tried and convicted of armed robbery and was later convicted of burglary. On appeal the burglary conviction was reversed. The Court held that the same evidence was used in both trials. In ruling that there could not be separate

trials for the burglary and the robbery, this Court employed the "same transaction test" to determine that the defendant had been tried twice for a single offense.

The conclusion to be reached after a careful analysis of Starnes and Lawson is that this Court has not accepted either the "same evidence test" or the "same transaction test" exclusively. Rather, recognizing the distinct functions of the Double Jeopardy Doctrine, this Court has adopted the test that would most advance the interests of justice in each particular case.

Following this view, we have held that where a defendant robbed a drugstore, taking money and narcotics, and was arrested four hours later in possession of narcotics, consecutive trials and convictions for armed robbery and possession of narcotics were not barred by the Double Jeopardy Doctrine. Ryan v. State, Okl.Cr., 473 P.2d 322 (1970). In a special concurrence, it was emphasized that the distinguishing features in the case were the time and location of the two offenses, the implication being that had the narcotics offense not been carried over to a distant time and place the result would have been different. Compare Hochderffer v. State, 34 Okl.Cr. 215, 245 P. 902 (1926), where the elements of time and location were the same. On the other hand, where two defendants kidnapped the victim and, with a third defendant, then committed rape of the same victim, we found that the act of kidnapping the victim was but a part of the force requisite to the greater offense of rape. We held that the defendants could not be punished for both kidnapping and rape, which was one transaction. Brumbelow v. State, Okl.Cr., 488 P.2d 1298 (1971).

Perhaps some confusion has resulted from our opinion in Smith v. State, Okl.Cr., 486 P.2d 770 (1971). There, the defendant was charged with robbing a taxi driver at knife point, taking the victim's money after stabbing him once in the neck and twice in the chest. The defendant was first convicted of assault and battery with a deadly weapon with intent to kill, and that conviction was affirmed. See Smith v. State, Okl.Cr., 481 P.2d 804 (1971). At a later trial, the defendant was convicted of robbery with a

dangerous weapon, and on appeal, he raised a double jeopardy question. A strict application of the "same evidence test" would not have required a reversal because the intent to kill is not an element of robbery and, conversely, assault with intent to kill does not require the taking of property from the victim. However, this Court reversed the robbery conviction, holding that separate trials could not be held on the robbery and assault charges.

Smith v. State, supra, could be read to imply that 22 O.S. 1971, § 11,[6] mandates application of the "same transaction test" exclusively when construing Art. 2, § 21,[7] of the Oklahoma Constitution. We intended no such implication, and the cases cited do not support that conclusion. In Smith this Court cited State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971), in which the defendant committed a forcible rape after threatening the victim with a knife. At a single trial, the defendant was convicted of the crimes of assault with a deadly weapon and first degree rape. The

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[6]Title 21 O.S.1971, § 11, provides:

"If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can [it] be punished under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other." (Footnote omitted)

[7]Art. 2, § 21, of the Oklahoma Constitution, provides:

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

Arizona Supreme Court affirmed the rape conviction and reversed the conviction for assault with a deadly weapon. In so doing, the Court stated:

> "In a recent opinion of this Court, wherein the defendant was charged with attempted kidnapping while armed with a gun, Count I, and assault with a deadly weapon or instrument, to wit: a gun, Count II, both offenses or counts arising out of the same act, our Court stated that the 'practical test is to eliminate the elements in one charge and determine whether the facts left would support the other charge.' State v. Mitchell, 106 Ariz. 492, 478 P.2d 517, 520 (1970). In the instant case, it is clear that the element of force or violence necessary to the crime of 1st degree rape was supplied by the fear of personal violence induced by the defendant's usage of a deadly weapon, to wit: the knife, and without such usage that the element of 1st degree rape would not exist. . . ." (Citation omitted)
>
> * * *
>
> "We do not by this opinion hold that there cannot be fact situations wherein a person may be convicted of both assault and 1st degree rape. That determination must be made on a case to case basis. We do hold that under the facts in this case the two convictions and sentences cannot stand together. . . ." (Citations omitted)

From the language, it is clear that the Arizona Court utilized the "same evidence test" in deciding the double jeopardy issue.

In People v. Ridley, 63 Cal.2d 671, 47 Cal.Rptr. 796, 408 P.2d 124 (1965), also cited in Smith v. State, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder and first degree robbery. At a single trial, the defendant was convicted of both offenses. Use of the "same evidence test" resulted in a finding that the assault was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery. Therefore, the defendant could be punished for any one of the offenses, but not for more than one. There was only a single offense, and the defendant could not be tried twice for it. In re Henry, 65 Cal.2d 330, 54 Cal.Rptr. 633, 420 P.2d 97 (1966), presented the Court with the same issue, and the same rationale was employed in an opinion by Chief Justice Traynor.

Both Arizona and California have statutes similar to 21 O.S.1971, § 11. See Ariz. Rev. Stats., § 13-1641, and the California Penal Code, § 654. See also Wildman v. State, 42 Ala.App.

357, 165 So.2d 396 (1963).

While a few states have adopted the same transaction standard as a matter of state law, it has not been applied as a federal constitutional requirement. As noted in Cousins v. State, 354 A.2d 825 (Md.App.1976), the majority of states have not adopted the "same transaction test" but have continued to apply the "same evidence test" for defining whether two offenses are the same for double jeopardy purposes. Cited therein as rejecting the "same transaction test" is Kupiec v. State, Okl.Cr., 493 P.2d 444, 446 (1972).

In Kupiec the defendant forced his way into a house, took various items of personal property, and raped one of the residents. There were separate trials for armed robbery and rape, with evidence of both crimes being presented at both trials. The defendant's double jeopardy argument was rejected, using a strict "same evidence" approach. The Court said that the armed robbery and the rape were clearly separate and distinct crimes and that the proof required for each was quite dissimilar. The "evidence of other crimes" issue was also raised, but it was treated by the Court's saying that evidence of other crimes was properly admitted in both cases as part of the res gestae.

D

In reaching what we believe to be a reasonable approach to this complex issue, we note that the cases raising double jeopardy claims come within a few broad categories. In one category, are those cases in which, in a single trial, a defendant is convicted of two offenses arising from the same general criminal episode. In such cases we have generally held that the interests of justice are best served by application of the "same evidence test" to determine the propriety of multiple charges. In another group are those cases in which a defendant is convicted of two crimes, one of which is, as a matter of law, a necessary element of the other. Here, whether there was one trial or two, application of either test will result in one conviction being vacated.

The preceding categories are the black and white groups. In

the gray category are those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode. In dealing with these cases, an appellate court must consider both aspects of double jeopardy discussed above: More than one trial for a single offense and more than one punishment for a single offense. We believe that the protection against multiplicity of trials is best advanced by application of the "same transaction test." However, the protection against multiplicity of punishments is a separate and independent question; and even where the "same transaction test" mandates a single trial, application of the "same evidence test" could result in a holding that a defendant could be punished separately for each of the offenses involved. In this connection, we again remind prosecutors of the special concurring opinion attached to Dodson v. State, Okl.Cr., 562 p.2d 916 (1977), in which Judge Brett explained that where a series of acts is involved, an accused can be charged with several counts in a single information.[8] It should not be inferred that because we treat the double jeopardy issue in one case by using one test this Court will not apply the other test in appropriate cases.

By this opinion we do not, in the words of Mr. Chief Justice Burger, find ourselves "endowed with a perception all our predecessors lacked and in an area of the law encountering no new facts." See the dissenting opinion by Burger, C. J., in Ashe v. Swenson, supra, 397 U.S. at 464. Instead, we merely follow the collective wisdom of this Court's prior decisions and elect that course which allows this Court to utilize the necessary tools to accomplish the task before it. In taking this course, we do nothing more than elevate the distinct purposes of the Double Jeopardy Doctrine to the equal dignity and reverence each deserves.

This reasoning leads us to conclude that while the appellant

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[8]Further, pursuant to 22 O.S.1971, § 439, if it appears that a defendant or the State is prejudiced by joinder of offenses in an indictment or information, the court shall order an election or separate trial of counts or provide whatever other relief justice requires.

herein could be punished separately for Murder in the Second Degree and Kidnapping for the Purpose of Extortion, both crimes should have been adjudicated in a single trial. The murder charge could not have been tried in Tulsa County because of a lack of venue; however, because kidnapping is a continuing crime, both charges could have been, and should have been, tried in Osage County.[9]

On the other hand, public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to begin asserting alleged denials of constitutional protections. There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time. This is not true of the double jeopardy protection. See Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Although both the murder and the kidnapping cases were in process at the same time, the appellant did not raise the double jeopardy issue until the case in Tulsa County (kidnapping charge) had been completed. In fact, he succeeded in postponing the Osage County case (murder charge) until the other one was over. Had the issue been raised in the beginning, the kidnapping charge could have been dismissed in Tulsa and filed in Osage County, so that the two charges could have been tried together; whereas enforcement of the double jeopardy protection in accordance with the appellant's strategy would have barred prosecution of the appellant on one of the charges. This Court, accordingly, holds that the appellant waived his double jeopardy protection.

II

The appellant next asserts that the trial court erred in overruling defense counsel's motion to suppress and his demurrer to the evidence. He asserts the verdict is unsupported by the

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[9]Or, had there been no kidnapping charge in another county, the Osage County District Attorney could have forgone the kidnapping charge and filed a single charge of murder.

evidence. As each item of evidence was introduced at trial the defense attorney responded, "No objection." The failure to object to evidence admitted at trial is a waiver of any error that such admission might have constituted. Box v. State, Okl.Cr., 541 P.2d 262 (1975). The logical implication of the failure to object is that the appellant acquiesced in the court's ruling on the motion to suppress. It follows that the appellant's assertion is also without merit because evidence admitted at trial without objection may be properly considered by the jury.

III

We next consider the allegation that the verdict forms were defective. The appellant insists that the usual verdict forms slur over the State's burden of proof: instead of forms for finding an accused "guilty" or "not guilty," he proposes that the forms should read "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt." In his instructions to the jury, the judge specified the burden of proof numerous times; and he expressly told the jury that if they could not find beyond a reasonable doubt that the appellant was guilty, then they were obliged to find him not guilty. The appellant's argument is unsound.

IV

The final assertion of error is that the prosecutor's closing argument was improper. Specifically, the appellant contends that in referring to the testimony of the appellant's brother relative to a telephone conversation between the appellant and his brother, the prosecutor recounted, "Find Duck. Tell him if he is any kind of cousin he will find that body and get rid of it because if he don't, I'll get the electric chair." The prosecutor then continued, "They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there."

The appellant contends that this reference to the death penalty during closing argument was so prejudicial to the appellant

as to require a reversal. We do not agree. The trial court properly instructed the jury with regard to the sentence to be imposed upon a conviction for second degree murder. In view of the proper instruction of the court, the complained of error in the prosecutor's closing argument, if error at all, did not violate a substantial right of the accused.

The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA,
HONORABLE DON H. HAMPTON, JUDGE

KURK KENDALL JOHNSON, appellant, was convicted of the offense of Second Degree Murder; was sentenced to ten (10) years' to life imprisonment, and appeals. AFFIRMED.

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OPINION BY CORNISH, P. J.
BRETT, J., CONCURS
BUSSEY, J., SPECIALLY CONCURS

BUSSEY, J., SPECIALLY CONCURRING:

The offenses of kidnapping and murder in the second degree are separate and distinct crimes under the facts of this case. Cf. 21 O.S.Supp.1976, § 701.8, ¶ 2, and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). A conviction for one should not bar the prosecution and conviction of the other. In summary, each of these charges requires the proof of at least one and, in fact, several facts or elements that proof of the other does not so require. The Double Jeopardy Clauses of the state and federal constitutions are not offended by separate prosecution and punishment here. See Clay v. State, Okl.Cr., 593 P.2d 509 (1979), and Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5161

KURK KENDALL JOHNSON,

Petitioner,

versus

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5161

KURK KENDALL JOHNSON,

Petitioner,

versus

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Oklahoma (hereinafter referred to as the State), by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on May 21, 1980.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 611 P.2d 1137 (Okla.Crim. 1980).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 21, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *."

Article II, Section 21 of the Constitution of the State of Oklahoma provides in part:

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

Article II, Section 20 of the Constitution of the State of Oklahoma provides in part:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law."

Okla. Stat. tit. 22, § 124 (1971) provides:

"When a public offense is committed, partly in one county and partly in another county, or the acts or effects thereof, constituting or requisite to the offense, occur in two or more counties, the jurisdiction is in either county."

Okla. Stat. tit. 22, § 126 (1971) provides in part:

"The jurisdiction of an indictment or information:

"1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him, with intent, against his will, to cause him to be secretly confined or imprisoned in this State, or to be sent out of the State, or from one county to another; or,

* * * *

"Is in any county in which the offense is committed or into or out of which the person upon whom the offense was committed, may, in the commission of the offense, have been brought or in which an act was done by the defendant in instigating, procuring, promoting, aiding or in being an accessory to the commission of the offense, or in abetting the parties concerned therein."

Okla. Stat. tit. 21, § 746 (1971) provides:

"Every offense prohibited in the last section [Okla. Stat. tit. 21, § 745 (1971), which defines Kidnapping for the Purpose of Extortion] may be tried in the county in which the crime may have been committed or in any county through which the person so seized, confined, inveigled or kidnapped shall have been taken, carried, or into which such person may be brought."

Okla. Stat. tit. 22, § 438 (1971) provides:

"The court may order two or more indictments or informations or both to be tried together if the offenses and the defendants, if there

> is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution was under such single indictment or information."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the bar against double jeopardy precludes petitioner's prosecution for Murder in the Second Degree in one county where the State has previously prosecuted him for Kidnapping for the Purpose of Extortion in a second county when the matter arose out of the same transaction?

2. Whether a criminal defendant may invoke one constitutionally protected right to the exclusion of a second constitutionally protected right and claim reversible error as a result?

STATEMENT OF THE CASE

On March 30, 1975, Kurk Kendall Johnson (hereinafter referred to as petitioner) kidnapped Tulsa restauranteur Earl Edward Bell and attempted unsuccessfully to extort twenty thousand dollars ($20,000.00) from Bell's family for his safe return. On April 1, 1975, one day following his arrest, petitioner was charged by information in the District Court of Tulsa County (Case No. CRF-75-690) with the crime of Kidnapping for the Purpose of Extortion, pursuant to Okla. Stat. tit. 21, § 745 (1971).

On April 2, 1975, Earl Edward Bell's body was found near a road in Osage County. Bell had been shot twice in the head. On April 16, 1975, petitioner was charged by information in the District Court of Osage County (Case No. CRF-75-294) with the offense of Murder in the First Degree, pursuant to Okla. Stat. tit. 21, § 701.1(2) (Supp. 1973).[1]

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[1] In an effort to comply with this Court's decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), reh. denied, 409 U.S. 902, 34 L.Ed.2d 164, 93 S.Ct. 89, 90 (1972), the Oklahoma Legislature pursued the extreme approach necessary to curb the unfettered discretion therein condemend by repealing the State's current capital punishment provisions and enacting Okla. Stat. tit. 21, § 701.1 et seq. (Supp. 1973), which made the assessment of the death penalty mandatory upon conviction for Murder in the First Degree. Section 701.1(2) provided:

> "Homocide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of

Preliminary hearings were held in the respective courts and petitioner was bound over for trial on both charges. On September 3, 1975, petitioner moved for a continuance[2] of the murder trial in Osage County until after the conclusion of the kidnapping trial in Tulsa County. Petitioner's motion was granted.

(Continued)

> any other human being, is murder in the first degree in the following cases:
>
> * * *
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years; * * *."

This provision has since been repealed by Laws 1976, 1st Ex. Sess., c. 1 § 10 (eff. July 24, 1976), now codified as Okla. Stat. tit. 21, § 701.7 (Supp. 1976).

[2]The substance of petitioner's "Motion for Continuance And to Strike From Jury Docket" is as follows:

> "1. That the defendant will be tried in Tulsa County at approximately the same time on a charge of Kidnapping which charge arose out of the same indicent [sic] as the charge herein and, therefore, an impartial trial cannot be had at this time. That the trial in Tulsa County will be publicized in the newspapers, on television and on the radio and said publicity will cause an influence over the inhabitants of Osage County. That because of said fact the defendant will not be able to impanel a fair, impartial and unprejudiced jury at this time.
>
> "2. That the defendant's court appointed attorneys will have but a short period of time to evaluate the evidence presented at the trial in Tulsa County. That both charges arose out of the same incident and are, therefore, similar in evidence to be introduced at trial.
>
> "3. That it would be a hardship for the defendant to undergo two trials of such serious charges in such a short period of time.
>
> "4. That the United States Supreme Court has 'indicated' that it will rule sometime this fall on the constitutionality of the mandatory death sentence under the North Carolina murder statute. That the Oklahoma murder statute is similar to that of North Carolina's. That the ruling of the United States Supreme Court will affect the constitutionality of the Oklahoma murder statute. That to require the defendant to be tried under

On September 5, 1975, petitioner was found guilty by a Tulsa County District Court jury of the crime of Kidnapping for the Purpose of Extortion. Punishment was assessed at sixty (60) years in the custody of the State Department of Corrections.[3]

On October 28, 1975, petitioner filed a pro se pleading in the District Court of Osage County entitled "Petition For Writ of Prohibition or Petition For Writ of Habeas Corpus or Petition For Writ of Mandamus," alleging that a trial for Murder in the First Degree would violate his State and Federal constitutional rights to be free from multiple trials and multiple punishments, inasmuch as there was an identity of offenses between Murder in the First Degree and Kidnapping for the Purpose of Extortion. Prior to a disposition of the matter, petitioner also sought similar relief from the Oklahoma Court of Criminal Appeals. On December 15, 1975, the appellate court dismissed the alternative petitions. See Johnson v. The District Court of Osage County and/or the District Attorney of Osage County and/or the State of Oklahoma (Okla.Crim., Case No. O-75-739, an unpublished order entered December 15, 1975) (Appendix "B"). Thereafter, the District Court of Osage County also denied the requested relief.

On February 20, 1976, petitioner filed in the District Court of Osage County a "Plea of Former Jeopardy" asserting that his conviction for the crime of Kidnapping for the Purpose of Extortion was a bar to the pending prosecution for Murder in First Degree; the crimes not being separate and distinct offenses. Five days later, as a supplement to his Plea of Former Jeopardy, petitioner

(Continued)

> the statute without its constitutionality being determined would be a hardship on the defendant.
>
> "5. That this motion is not made for the purpose of delay, but in order that justice may be done, and that said continuance should be granted and ordered by the Court." (Case No. CRF-75-294; R. 27-29).

[3]Petitioner's conviction was subsequently affirmed by the Oklahoma Court of Criminal Appeals. See Johnson v. State, 554 P.2d 51 (Okla.Crim. 1976), cert. denied, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364 (1976) (Appendix "A").

filed a motion to strike all references to the kidnapping from the charging portion of the Osage County information. Both the plea and the motion were overruled. (Case No. CRF-75-294, R. 76). Petitioner, acting both pro se and through his court appointed attorney, then sought a writ of mandamus from the Court of Criminal Appeals. In a per curiam opinion announced on June 24, 1976, that court vacated the trial court's ruling, holding that petitioner's "Plea of Former Jeopardy" and "Motion to Strike" should have been sustained. In its Order the court also stated:

> "However, we do find, as the Petitioner submits, that the previous conviction for Kidnapping for the Purpose of Extortion does not in any way prohibit a subsequent prosecution for Murder in the Second Degree, in violation of 21 O.S. Supp. 1971, § 701.2." (Emphasis added). Johnson v. Hampton, (Okla.Crim., Case No. O-76-150 at page 4, an unpublished opinion rendered June 24, 1976) (Appendix "C"). See Case No. CRF-75-294; R. 96.

Two weeks later, acting pro se, petitioner sought a rehearing in Case No. O-76-150 and/or a writ of prohibition. Petitioner, in a new double jeopardy argument relating only to multiple trials and not multiple punishments, contended that the State should be "collaterally estopped" from conducting a trial for Murder in the Second Degree arising out of the same facts and circumstances as the kidnapping. The Court of Criminal Appeals dismissed the petition for in the interim it had vacated the opinion it rendered in Johnson v. Hampton, (Okla.Crim., Case No. O-76-150) and directed that supplemental briefs be submitted. Thus, the petitioner's new double jeopardy argument was reduced to speculation and anticipation as to the court's ultimate decision in Case No. O-76-150. See Johnson v. Hampton (Okla.Crim., Case No. P-76-533, an unpublished order entered July 29, 1976) (Appendix "D").

On May 16, 1977, the Court of Criminal Appeals, in a split decision, denied petitioner's request for a writ of mandamus.[4] Johnson v. Hampton, 564 P.2d 641 (Okla.Crim. 1977) vacated 572 P.2d 1301 (Okla.Crim. 1978) (Appendix "E").

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[4]The Court of Criminal Appeals held:

> "The evidence in the kidnapping case, Johnson v. State, 554 P.2d 51 (F-76-179, August 26, 1976), established that Johnson

Petitioner next petitioned the United States Supreme Court for a writ of certiorari. In Johnson v. Hampton, 434 U.S. 947, 54 L.Ed.2d 307, 98 S.Ct. 471 (1977) (Appendix "F") this Court granted certiorari, vacated the May 16, 1977, decision of the Oklahoma Court of of Criminal Appeals denying mandamus, and remanded the case for further consideration in light of Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) and Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 471 (1977).

On remand the Court of Criminal Appeals granted a writ of prohibition, holding that the crime of Murder in the First Degree, as charged, necessarily included the lesser offense of Kidnapping for the Purpose of Extortion. The court further stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homocide which the facts and justice may warrant, not inconsistent with the views expressed in Brown, v. Ohio and Harris v. Oklahoma, supra." Johnson v. Hampton, 572 P.2d 1301, 1302 (Okla.Crim. 1978) (Appendix "G").

(Continued)

> kidnapped his victim in hopes of extorting a sum of money from the victim's relatives. The objective of extortion changed to murder after the attempts to extort the money apparently failed. The evidence does not establish that the purpose of the kidnapping was murder, but only that the purpose became murder after Johnson's extortion attempts failed and certainly the murder would also at least close the mouth of the one who could surely lead to Johnson's apprehension. Different societal interests are protected by the statutory laws prescribing kidnapping for the purpose of extortion and homicide. Certainly then two separate offenses may be committed although the offenses are proximate in time.
>
> "Therefore, in the instant case Johnson may be prosecuted for Murder in the First Degree with the underlying felony being the commission of or the attempt to commit the offense of Kidnapping for the Purpose of Extortion, notwithstanding that he has been previously convicted of said underlying felony. No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion." Johnson v. Hampton, 564 P.2d 641, 643 (Okla.Crim. 1977).

The information in Case No. CRF-75-294 was then amended to Murder in the Second Degree[5] with all references to the kidnapping stricken.

Petitioner then again sought a writ of prohibition from the Court of Criminal Appeals to bar a trial for Murder in the Second Degree "on the basis of collateral estoppel and grounds of double jeopardy." On March 9, 1978, the appellate court entered its Order declining to assume jurisdiction and dismissing the petition. The court was of the opinion that under the authority of Brown v. Ohio, and Harris v. Oklahoma, supra, "the issue sought to be raised is properly reviewable on appeal." Johnson v. Hampton, (Okla.Crim., Case No. P-78-101, an unpublished order rendered March 9, 1978) (Appendix "H").

Petitioner was then tried and convicted by an Osage County jury of the crime of Murder in the Second Degree. Punishment was assessed at ten (10) years to life in the custody of the State Department of Corrections. On direct appeal the Court of Criminal Appeals affirmed petitioner's Judgment and Sentence. See Johnson v. State, 611 P.2d 1137 (Okla.Crim. 1980) (Appendix "I").

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[5]Pursuant to Okla. Stat. tit. 21, § 701.2 (Supp. 1973) (now repealed), which provided:

> "Homicide is murder in the second degree in the following cases:
>
> "1. When perpetrated without authority of law, and with a premeditated design to effect the death of a person, or of any other human being, but by an act not enumerated in the preceding section;
>
> "2. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or
>
> "3. When perpetrated without any design to effect death by a person engaged in the commission of any felony other than the felonious acts set out in Section 1 of this act."

ARGUMENT

I. PETITIONER WAIVED ANY CLAIM OF DOUBLE JEOPARDY (A) BY FAILING TO INVOKE THE PROPER APPELLATE PROCEDURE TO ADEQUATELY PROTECT HIS DOUBLE JEOPARDY GUARANTEES; (B) BY FAILING TO APPLY FOR A CHANGE OF VENUE FOR THE PURPOSE OF JOINING THE INFORMATIONS FOR TRIAL; AND (C) BY MOVING FOR AND RECEIVING A CONTINUANCE OF HIS MURDER TRIAL UNTIL HIS KIDNAPPING TRIAL HAD BEEN COMPLETED.

The focal point of petitioner's argument is the proper standard to be used in determining the validity of a double jeopardy claim. Petitioner contends that the proper standard is "the same transaction test" as opposed to "the same evidence test." However, petitioner fails to note that while the Oklahoma Court of Criminal Appeals did discuss in its opinion the applicability of both standards, the application of either standard was not dispositive of petitioner's double jeopardy claim. To the contrary, the Oklahoma Court held that petitioner had waived any claim of double jeopardy. See Johnson v. State, 611 P.2d 1137, 1145 (Okla.Crim. 1980) (Appendix "I"), citing Jeffers v. United States, 432 U.S. 137, 53 L.Ed.2d 168, 97 S.Ct. 2207 (1977). Therefore, the "proper standard" to be applied to pleas of former jeopardy is academic in the context of the present case.

A.

In Illinois v. Vitale, ____ U.S. ____, 65 L.Ed.2d 228, 100 S.Ct. ____ (1980), this Court again noted that the Double Jeopardy Clause of the Fifth Amendment affords criminal defendants two distinct protections. First, it guarantees that multiple punishments will not be inflicted for the same offense. And second, it protects a defendant from being forced to endure a second or series of prosecutions for the same offense. In Abney v. United States, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977), this Court observed that prosecutorial or judicial abuse of the first guarantee can be adequately vindicated on appeal following final judgment. The second aspect of double jeopardy protection would be lost, however, if a defendant were forced to "run the guantlet" a second time before an appeal could be taken. 432 U.S. at 661, 52 L.Ed.2d at 661. For this reason, the Court in Abney held that pretrial orders rejecting pleas of former jeopardy constitute "final

decisions" from which an appeal could be taken without violating the policy ban against piecemeal appeals.[6]

Prior to the Oklahoma Court of Criminal Appeals' initial decision in Johnson v. Hampton, (Okla.Crim., Case No. O-76-150, an unpublished order entered June 24, 1976, but later vacated) (Appendix "C"), petitioner's double jeopardy claims were premised on his contention that Kidnapping for the Purpose of Extortion was a lesser included offense of Murder in the First Degree, as that crime was then defined by the Oklahoma Legislature. These claims encompassed both aspects of Double Jeopardy Clause protection.[7] The pro se rehearing and/or writ of prohibition sought by petitioner in that case (though assigned Case No. P-76-533) (Appendix "D") was the first time petitioner raised a double jeopardy claim based solely on the aspect of multiple trials. Petitioner also sought a writ of prohibition founded on the same assertion in Johnson v. Hampton, (Okla.Crim., Case No. P-78-101, an unpublished order entered March 9, 1978) (Appendix "H"). As noted earlier, the Court of Criminal Appeals denied relief without reaching the merits in either instance. Only on petitioner's direct appeal from his conviction, after petitioner had endured a second prosecution, did the court address the merits of his argument.

It is the State's contention that petitioner should have availed himself of the direct appeal provisions set forth at Okla. Stat. tit. 22, § 1051 (1971), which, under Abney, would have mandated review by the Court of Criminal Appeals prior to trial. Instead, petitioner invoked the alternative procedure of requesting

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[6]Though the Court's decision addressed only the jurisdictional requisites of 28 U.S.C. § 1291, the reasoning in Abney should apply equally to Okla. Stat. tit. 22, § 1051 (1971). For as Mr. Chief Justice Burger wrote in Abney:

> "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." (Emphasis the Court's). 431 U.S. at 662, 52 L.Ed.2d at 662.

[7]If two offenses are the same for purposes of barring consecutive sentences, they necessarily will be the same for purposes of barring successive prosecutions. Brown v. Ohio, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

extraordinary relief which the appellate court, in its discretion, could and did decline to hear.

As this Court observed in Abney, the Fifth Amendment prohibition against multiple trials "protects interests wholly unrelated to the propriety of any subsequent conviction." 431 U.S. at 661, 52 L.Ed.2d at 661. Here, as in Abney, petitioner makes no challenge whatsoever to the merits of the State's case in his murder trial. The sole ground on which petitioner contests his conviction is the authority of the State of Oklahoma to hale him into court and prosecute him for the murder of Earl Edward Bell after already having prosecuted him for Bell's kidnapping. Yet, the fact that petitioner might have been forced to endure a second trial bears not at all on the propriety of petitioner's sentence.[8]

Thus, to enjoy full Double Jeopardy Clause protection, a defendant shoulders the burden of instituting a pretrial appeal of a denial of his plea of former jeopardy just as a defendant shoulders the burden of affirmatively pleading former jeopardy.[9]

> "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." Abney v. United States, supra, 431 U.S. at 662. (Emphasis the Court's).

By failing to invoke the proper appellate procedure necessary to insure review of the trial court's decision, and necessary to fully preserve his constitutionally protected right, petitioner must be deemed to have waived any claim of fundamental error. For once petitioner's trial for Murder in the Second Degree had run its course, the protection against multiple trials conferred by the Double Jeopardy Clause, if applicable in this instance, was irreparably lost. Abney v. United States, supra. Compare

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[8]The Oklahoma Court of Criminal Appeals concluded that petitioner could be punished separately for Murder in the Second Degree and Kidnapping for the Purpose of Extortion, though it would have been preferable to have joined the issues for a single trial. Johnson v. State, 611 P.2d 1301 (Okla.Crim. 1980). See Okla. Stat. tit. 22, §§ 436-440 (1971); Dodson v. State, 562 P.2d 916 (Okla.Crim. 1977) (Brett, J., concurring). See also Whalen v. United States, ____ U.S. ____, 63 L.Ed.2d 715, 100 S.Ct. ____ (1980).

[9]See Okla. Stat. tit. 22, § 513(4) (Supp. 1976).

Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) (Rehnquist, J., dissenting).

B.

The Bill of Rights embodied in Article II of the Constitution of the State of Oklahoma grants criminal defendants a number of protected rights, among which is the right to be speedily and publically tried in the county in which the crime was committed. See Okla. Const., art. 2, § 20. Once the information charging petitioner with the crime of Kidnapping for the Purpose of Extortion was properly filed in the District Court of Tulsa County, petitioner had the constitutional right to be tried by an impartial jury in that county. See Okla. Stat. tit. 21, § 746 (1971); Okla. Stat. tit. 22, §§ 124, 126(1) (1971). Similarly, petitioner had the constitutional right to be tried by an impartial jury in the District Court of Osage County once the original information charging Murder in the First Degree had been properly filed.

The State maintains that petitioner cannot exercise this personal right, guaranteed by the State Constitution, to the exclusion of another personal right, the double jeopardy protections guaranteed by both the State and Federal Constitutions, and claim that his choice resulted in reversible error of constitutional magnitude.

Nor can petitioner fail to exercise a constitutional right necessary to protect a second constitutional right and then claim he was unduly prejudiced by his own inaction. Under Okla. Const., art. 2, § 20, petitioner also had the constitutional right to apply for a change in venue; a right much broader than that conferred by statute to the State.[10] See State ex rel Young v. Warren, 536 P.2d 965 (Okla.Crim. 1975); Carle v. State, 34 Okla.Crim. 24, 244 P. 833 (1926). Petitioner had within his means the capability of avoiding exposure to multiple trials. Petitioner could have applied to the District Court of Tulsa County for a change of venue to Osage County for the purpose of joining the informations for

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[10]The prosecution or the court on its own motion can transfer venue only when venue has been impermissibly established in the first instance. See Okla. Stat. tit. 22, § 445 (1971).

trial.[11] See Okla. Stat. tit. 22, § 438 (1971). Having failed to seek a joinder of the charges, petitioner's objection to multiple trials must be deemed to have been waived.

C.

In Jeffers v. United States, supra, this Court was faced with the issue of whether the petitioner therein had waived a claim of former jeopardy by actively opposing a government motion to consolidate trials for two separate offenses arising out of the same basic transaction. In Jeffers, four members of the Court held that Jeffers had waived his claim of double jeopardy; four specifically dissented from that view; and one justice concurred in the judgment but on different gounds. Regardless of the specific positions maintained in Jeffers, no member of the Court expressly or impliedly held that a criminal defendant could not waive a double jeopardy claim.[12] At most, the dissenters in Jeffers held that petitioner Jeffers had not waived his claim according to the facts of that specific case.

Following this Court's ruling in Jeffers v. United States, Jeffers initiated a habeas corpus action in federal district court alleging ineffective assistance of counsel, and again raising claims that the trial court and prosecutor had abrogated a duty to advise him of the consequences of his opposition to a joinder of the indictments for trial. In addressing the issue, the District Court noted that a claim of double jeopardy can be waived by counsel and that a "tactical decision to oppose a single trial on both indictments would preclude him from invoking it." Jeffers v. United States, 461 F.Supp. 300, 305 (N.D. Ind. 1978).

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[11] On petitioner's direct appeal the Court of Criminal Appeals noted that had petitioner raised the double jeopardy issue prior to the kidnapping trial, the kidnapping charge could have been dismissed in Tulsa County and refiled by the District Attorney in Osage County so that the two charges could have been tried together. Though this could have avoided the issue of multiple trials, the combined actions of the District Attorneys were discretionary and could not be enforced by mandamus.

[12] See also Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959), reh. denied, 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737 (1959); United States v. Young, 503 F.2d 1072 (3d Cir. 1974); United States v. Hill, 473 F.2d 759 (9th Cir. 1973); Caballero v. Hudspeth, 114 F.2d 545 (10th Cir. 1940); Stockton v. State, 508 P.2d 663 (Okla.Crim. 1973).

In the instant case petitioner, by his actions and omissions, also waived any claim of former jeopardy. Petitioner was first charged in Tulsa County with the crime of Kidnapping for the Purpose of Extortion. One day following the filing of the kidnapping charge, the body of Earl Edward Bell was found in Osage County; hence, the delayed filing of the separate charge of Murder in the First Degree. The lodging of both charges predated this Court's decisions in Harris v. Oklahoma and Brown v. Ohio, supra, and were consistent with the holdings of Williams v. State, 321 P.2d 990 (Okla.Crim. 1957) and Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959) (which involved separate prosecutions and punishments for a kidnapping-murder occurring in separate counties).[13]

In Jeffers v. United States, 432 U.S. 137, 150 n. 15, 53 L.Ed.2d 168, 179 n. 15, 97 S.Ct. 2207 (1977), the plurality held:

> "Unless it is plain that two offenses are 'the same' for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option. This assumption would only be reinforced if the defendant affirmatively asked the court to require two proceedings, and in connection with his request he actively sought postponement of the second trial, as Jeffers did."

As noted earlier, the instant petitioner, like Jeffers, actively sought and received a postponement of his second trial. It was not until after the first trial had been completed, and he had been found guilty of kidnapping Earl Edward Bell, that petitioner voiced his double jeopardy plea. And even then it was founded primarily on his right to be free from multiple punishments as opposed to multiple trials.[14]

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[13]The Oklahoma Court of Criminal Appeals relied on Williams v. State, and Williams v. Oklahoma, supra, in denying mandamus in Johnson v. Hampton, 564 P.2d 641 (Okla.Crim. 1977) (Appendix "E"), vacated 572 P.2d 1301 (Okla.Crim. 1978). See also Stockton v. State, 508 P.2d 663 (Okla.Crim. 1973) which held that the Double Jeopardy Clause did not prohibit separate prosecutions and punishments for kidnapping (Tulsa County) and rape (Creek County) arising out of the same incident.

[14]Petitioner's first double jeopardy claim, filed pro se, was predicated on the fact that Kidnapping for the Purpose of Extortion was an essential element of the crime of Murder in the First Degree, as then defined by Okla. Stat. tit. 21, § 701.1(2) (Supp. 1973). See Case No. CRF-75-294; R. 31-34.

Unlike the government in Jeffers, the State did not seek a joinder of the charges against petitioner due to the barrier imposed by Okla. Stat. tit. 22, § 445 (1971). Nonetheless, petitioner, like Jeffers, did affirmatively seek separate proceedings by virtue of his course of action. Petitioner's failure to seek a change of venue along with his request that the murder trial be postponed, can be likened to the course of action adopted by Jeffers.

Petitioner was "under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue." Jeffers v. United States, 432 U.S. at 137 n. 15, 53 L.Ed.2d at 179 n. 15.

> "The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention." Jeffers v. United States, 432 U.S. at 154 n. 22, 53 L.Ed.2d at 182 n. 22.

No action of the State contributed to the separate prosecutions other than perhaps failing to discover the body prior to the filing of the kidnapping charge, and then filing the murder charge in accordance with state law regarding jurisdiction and venue. Since petitioner persuaded the District Court of Osage County to postpone his trial for murder, any right that he might have had against consecutive trials must be deemed to have been waived.

II. NO SUBSTANTIAL FEDERAL QUESTION EXISTS FOR (1) "THE SAME TRANSACTION TEST" DOES NOT APPLY, AND (2) APPLICATION OF "THE SAME TRANSACTION TEST" WOULD NOT YIELD A DIFFERENT RESULT.

Petitioner urges this Court to discard "the same evidence test," see Blockburger v. United States, 284 U.S. 299, 96 L.Ed.2d 306, 52 S.Ct. 180 (1932), in favor of "the same transaction test." Relying primarily on Mr. Justice Brennan's dissent in Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), petitioner argues at pages 10 and 11 of his petition:

> "In the instant case, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case were [sic] virtually identical. While the offenses are different, and the elements there are not the same, the evidence was the same, as was the transaction. It was but one criminal episode." (Emphasis added).

The State respectfully submits that there exists no substantial federal question which would warrant review by this Honorable Court. Though petitioner's contention on its surface appears to reach constitutional dimension, the disposition of petitioner's claim rests on state evidentiary and procedural law. Application of "the same transaction test" to the instant case would not yield a different result.

Dissenting in Ashe v. Swenson, supra, Mr. Justice Brennan wrote:

> "In my view, the Double Jeopardy Clause requires the prosecution, except in limited circumstances, to join at one trial all the charges against a defendant that grow out of a single cirminal act, occurrence, episode or transaction." 397 U.S. at 453-454, 25 L.Ed.2d at 481. (Emphasis added).

In footnote 7 to his opinion, Justice Brennan offered two examples of "limited circumstances" which would constitute exceptions to a single trial requirement:

> "For example, when a crime is not completed or discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the 'same transaction' rule should be made to permit a separate prosecution. * * * Another exception would be necessary if no single court had jurisdiction of all the alleged crimes." 397 U.S. at 453 n. 7, 25 L.Ed.2d at 481 n. 7.

The instant case envelopes both exceptions. Petitioner was charged with Earl Edward Bell's kidnapping in the District Court of Tulsa County. Not until after this charge was lodged did police discover that Bell had also been murdered. The State then charged petitioner with Bell's murder in the District Court of Osage County because the District Court of Tulsa County did not have jurisdiction. Thus, even under Mr. Justice Brennan's view[15] of "the same evidence test," petitioner could constitutionally be subjected to successive prosecutions and multiple punishments under "the same transaction test."

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[15] See also Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977) (Brennan, J., dissenting); Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) (Brennan,J., dissenting); Thompson v. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768 (1977) (Brennan,J., dissenting); Harris v. Washington,

The fatal flaw in petitioner's application of "the same transaction test" is equating repetition of proof with repetition of evidence. In essence, petitioner does not seek protection from a relitigation of factual issues previously determined, but rather he seeks a limitation on the prosecution's quantum of proof. In so doing, petitioner has expanded and elevated the evidentiary policy ban on the use of other crimes evidence to the level of an absolute constitutional barrier under the guise of double jeopardy protection.

Though the kidnapping was a continuous crime which ended with Bell's murder, the course of petitioner's conduct was divisible. See Blockburger v. United States, supra; Stockton v. State, 509 P.2d 153 (Okla.Crim. 1973); Lawson v. State, 484 P.2d 901 (Okla. Crim. 1971), Ryan v. State, 473 P.2d 322 (Okla.Crim. 1970); Okla. Stat. tit. 21, § 11 (1971). There was no overlap in either the content or timing of the essential elements of the two offenses. There was a separation of time, location and objective. Compare Smith v. State, 486 P.2d 770 (Okla.Crim. 1971).

Proof of the kidnapping was not not needed to prove the charge of Murder in the Second Degree. See Harris v. Oklahoma, supra. However, evidence of the kidnapping did shed relevant light on the charge of Murder in the Second Degree. See Okla. Stat. tit. 12, § 2404(b) (Supp. 1978)[16]; F.R.Cr.P. 404(b). But, the crucial point is the necessary evidence of both crimes differed. See Stockton v. State, supra at 155. Though there was an overlap of evidence, there was no overlap of proof. See Iannelli v. United States, 420 U.S. 770, 785 n. 15, 43 L.Ed.2d 616, 627 n. 17, 95 S.Ct. 1284 (1975). See also Illinois v. Vitale, ____ U.S. ____, 65 L.Ed.2d 228, 236, 100 S.Ct. ____ (1980). There was no relitigation of ultimate issues crucial to both offenses. Cf. Harris v. Washington,

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(Continued) 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971); Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970) (Brennan, J., concurring); Abbate v. United States, 359 U.S. 187, 3 L.Ed.2d 729, 79 S.Ct. 666 (1959); Gore v. United States, 357 U.S. 386, 2 L.Ed.2d 1405, 78 S.Ct. 1280 (1958) (Douglas, J., dissenting).

[16]Okla. Stat. tit. 12, § 2404(b) (Supp. 1978) is consistent with Oklahoma case law. Burks v. State, 594 P.2d 771 (Okla.Crim. 1979).

404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971); Gore v. United States, 357 U.S. 386, 396, 2 L.Ed.2d 1405, 1412, 78 S.Ct. 1280 (1958) (Douglas, J., dissenting).

A review of petitioner's case will reveal that a single criminal act was not divided into "temporal or spatial units." See Brown v. Ohio, 432 .S. 161, 169, 53 L.Ed.2d 187, 198, 97 S.Ct. 2221 (1977). To the contrary, two separate and distinct offenses, unique in time, location and objective, occurred in a successive, though divisible manner. Successive prosecutions in this case were not an attempt by the State to increase petitioner's punishment for a single criminal episode, see Iannelli v. United States, supra, 420 U.S. at 793, 43 L.Ed.2d at 632 (Douglas, J., dissenting), but rather an attempt to punish petitioner, in accordance with his state constitutional and statutory rights, for the more heinous of two criminal occurrences.

CONCLUSION

For these reasons, the respondent State of Oklahoma respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

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) ss:
COUNTY OF OKLAHOMA)

I, Timothy S. Frets, depose and say that I am an attorney in the office of Jan Eric Cartwright, attorney of record for the State of Oklahoma, respondent herein, and that on October 21, 1980, pursuant to Rule 33, of the Rules of the Supreme Court, I served one

copy of the foregoing brief by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to the following:

Billy Leon Heskett
304 First National Bank Bldg.
Pawhuska, OK 74056

All parties required to be served have been served.

Timothy S. Frets
TIMOTHY S. FRETS

Subscribed and sworn to before me this 21st day of October, 1980.

L. Kay Brown
Notary Public

My Commission Expires:

June 26, 1982

(1974); *Carney v. State*, Okl.Cr., 406 P.2d 1003 (1965).

For the above and foregoing reasons it is the opinion of this Court that the judgment and sentence appealed from should be and the same is, hereby, *AFFIRMED*.

BRETT, P. J., and BLISS, J., concur.

Kurk Kendall JOHNSON, Appellant,
v.
The STATE of Oklahoma, Appellee.
No. F-76-179.

Court of Criminal Appeals of Oklahoma.
Aug. 26, 1976.

Certiorari Denied Nov. 8, 1976.
See 97 S.Ct. 384.

Defendant was convicted before the District Court, Tulsa County, Glen Dale Carter, J., of kidnapping for extortion, and he appealed. The Court of Criminal Appeals, Bussey, J., held that police officers had probable cause based on exigent circumstances to open trunk of defendant's car and search same in hopes of saving human life and that items seized in plain view thereof were thus properly admitted; that even if search was unconstitutional and therefore items seized inadmissible, there was ample evidence from which court and jury could have found defendant guilty; in light of all precautions taken by trial court, evidence of kidnapping victim's death was properly admitted, and that defendant's sentence was not so excessive as to require modification.

Affirmed.

1. Searches and Seizures ⇐3.3(6)

Although bench warrant for minor traffic offense did not justify search of trunk of defendant's automobile, that did not necessarily mean that search itself of automobile conducted when police officers went to defendant's home with that traffic warrant and picked him up as suspect in kidnapping was improper or unconstitutional.

2. Searches and Seizures ⇐7(1)

Relevant test with respect to legality of search was not whether it was reasonable to procure search warrant, but whether search was reasonable.

3. Searches and Seizures ⇐3.3(1)

One exception to general search warrant rule is situation where exigent circumstances or state of exigency exists.

4. Criminal Law ⇐394.4(12)
Searches and Seizures ⇐3.3(7)

Police officers, who had information that elderly and ill man had been kidnapped and was being held in trunk of automobile and that defendant's voice had been identified as voice on tapes demanding ransom and who, upon arriving at residence of defendant with traffic warrant and to pick him up as suspect in kidnapping, at time when kidnapping was 24 hours old and emergency situation was at hand, had opportunity to observe his demeanor and behavior and to realize that one of "drop" locations was only few hundred yards from defendant's apartment, had probable cause based on exigent circumstances to open trunk of defendant's car and search same in hopes of saving human life, and items seized in plain view thereof were thus properly admitted in evidence in kidnapping for extortion prosecution. 21 O.S.1971, § 745.

5. Criminal Law ⇐1169.2(5)

Even if search of trunk of defendant's car, conducted when police officers went to his home with traffic warrant and to pick him up as suspect in kidnapping, was unconstitutional and therefore items seized therein inadmissible, there was ample evidence from which court and jury could have found defendant guilty of offense of kidnapping for extortion and thus, the admission of the seized items was harmless error. 21 O.S.1971, § 745.

APPENDIX "A"

6. Kidnapping ⇐5

Evidence of kidnapping victim's daughter, who testified, inter alia, that after her father failed to return home after work, she began to receive telephone calls from person she identified as "black male" demanding ransom for safe return of her father and that she went to three different locations in attempt to make "drops" of money demanded, and testimony of defendant's brother that defendant showed him man in back of defendant's car and identified him as white male, that defendant related to him that he was going to hurt the man and try to get some money, and that defendant owned rifle of type thought to have been used to kill victim, standing alone constituted prima facie case in prosecution for kidnapping for extortion. 21 O.S.1971, § 745.

7. Criminal Law ⇐369.2(1)

In situation where evidence of other crimes is sought to be admitted, trial court must weigh probative value of evidence with any prejudicial effect that it might have.

8. Criminal Law ⇐673(5)

In light of all precautions taken by trial court with respect to reference to death of victim, in prosecution for kidnapping for extortion, to wit, admonishment to state, subsequent instruction that jury must not consider any evidence concerning any other alleged offense that may have been committed by defendant except insofar as it tended to prove that defendant committed offense charged, and probative value of evidence which tended to connect defendant with crime, evidence of death of victim, for which separate murder case was pending, was properly admitted. 21 O.S.1971, § 745.

9. Kidnapping ⇐6

Considering all facts and circumstances, defendant's sentence to 60 years' imprisonment upon his conviction of kidnapping for extortion, pursuant to statute setting punishment for crime of kidnapping for purpose of extortion at not less than ten years, was not so excessive as to require modification. 21 O.S.1971, § 745.

An appeal from the District Court, Tulsa County; Glen Dale Carter, Judge.

Kurk Kendall Johnson, appellant, was convicted of the offense of Kidnapping for Extortion; was sentenced to sixty (60) years' imprisonment, and appeals. Judgment and sentence AFFIRMED.

Leslie R. Earl, Public Defender, Pete Silva, Jr., Asst. Public Defender, Tulsa County, for appellant.

Larry Derryberry, Atty. Gen., Robert L. McDonald, Asst. Atty. Gen., Toby Mash, Legal Intern, for appellee.

OPINION

BUSSEY, Judge.

Appellant, Kurk Kendall Johnson, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Tulsa County, Case No. CRF–75–690, for the offense of Kidnapping for Extortion, in violation of 21 O.S.1971, § 745. The jury assessed punishment at sixty, (60) years in the custody of the Department of Corrections, for which on the 19th day of September, 1975, judgment and sentence was pronounced in accordance with the jury verdict. From said judgment and sentence the defendant has filed this timely appeal.

The State first called Celia Nading. She stated her father was Earl Bell and that he was the assistant manager for Picadilly Cafeteria in Tulsa, Oklahoma. She testified that her father had gone to work on the 30th of March, 1975, and had failed to return home at his usual hour. She and her mother became worried and began to look for him at approximately 11:00 p. m. on that date. They found his automobile parked near the Picadilly Cafeteria, but were unable to locate Mr. Bell. They reported same to the Tulsa Police. Upon returning back to the home, the witness testified that she began to receive telephone

calls from a person she identified as a "black male," demanding $20,000.00 for the safe return of her father. She stated that in cooperation with the Tulsa Police Department she went to three different locations within the City of Tulsa, Oklahoma, in attempt to make "drops" of the ransom money demanded. She further identified a voice on a tape recording which had been placed on her mother's phone with her mother's permission, as the voice of the person who had made the telephone calls to her demanding the money. She testified she never saw her father again alive.

The State next called Tulsa Police Officer Carroll Gatlin. Officer Gatlin testified that he had been assigned to the Bell case on March 31, 1975. He further testified that he went to the defendant's residence in the City of Tulsa with a traffic warrant and to pick him up as a suspect in the Bell kidnapping. He further testified that he had information via voice identification that the defendant was the person involved in the kidnapping. The officer then testified that along with two other police officers he proceeded to open the trunk of defendant's car after obtaining the keys from defendant's wife. The officer testified that the reason for opening the trunk was to look for Mr. Bell, and if he was in the trunk to rescue him and thus save his life since Mr. Bell was in his 60's and in ill health. Upon opening the trunk the officers discovered a .22 caliber rifle and pry marks on the inside of the trunk.

The next witness called on behalf of the State was a William Johnson. Mr. Johnson testified that he was a brother of the defendant. He identified the defendant. Mr. Johnson testified that on or about the 30th day of March, 1975, in the late evening hours or early morning hours of March 31, 1975, his brother, the defendant, showed him a man in the back of defendant's car. The witness identified the man as a white male. The witness further stated that defendant related to him that he was "going to hold the man and try to get some money." The witness also testified that to his knowledge his brother owned a .22 caliber rifle which was partially wrapped with black tape.

The State next called Tulsa Police Officer Tom Lewellyn. Officer Lewellyn testified as to the chain of custody regarding the gun found in the trunk of the defendant's car. The witness also testified as to the chain of custody concerning two .22 caliber cartridges found near the scene where Mr. Bell was discovered. The witness also identified some leaden projectiles taken from the body of Mr. Bell.

The next witness for the State was Tulsa Police Officer Roy Goodenough. Officer Goodenough stated that some of the tape found around the neck of Mr. Bell's body was similar to the tape which was found as designs on defendant's automobile.

The next witness for the State was agent Robert Seibert of the Federal Bureau of Investigation. This witness was qualified as a ballistics expert and testified that the cartridges found near the body of Mr. Bell were fired by the .22 rifle which had been found in defendant's car, exclusive of all other weapons in the world. He further testified that the leaden projectiles recovered from the body of Mr. Bell were too mutilated for definite identification but were not inconsistent with projectiles fired from the defendant's weapon.

[1–6] For his first assignment of error the defendant alleges that the trial court erred in failing to sustain defendant's motion to suppress items obtained during the illegal search of defendant's automobile, more particularly, the trunk compartment of said automobile. The defendant argues that this was a warrantless search without probable cause and that if there had been probable cause there was ample time for the officers to have obtained a search warrant. The defendant urges that in no way will a bench warrant for a minor traffic offense justify a search of the trunk of a defendant's automobile. With this last statement we wholeheartedly agree, how-

ever, this does not necessarily mean that the search itself was improper or unconstitutional. The Attorney General does not rely on a custodial arrest pursuant to a bench warrant to justify the opening of the trunk of defendant's automobile, but rather on the exigent circumstances then and there existing. "It is argued that the searching officers had time and opportunity to procure a search warrant prior to the search, and for this reason the search in question was illegal. It has been decided that this naked fact alone does not render the search of an automobile illegal." *Jenkins v. State*, 116 Tex.Cr. 374, 32 S.W.2d 848 (1930). See also, *United States v. Roberts*, D.C., 90 F.Supp. 718 (1950). Therefore, the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. One of the exceptions to the general search warrant rule is the situation where exigent circumstances or a state of exigency exists. "As a general rule the facts preceding a search must present sufficient facts to warrant an officer to reasonably infer contraband is within the vehicle. Further, there must be exigent circumstances which justify the officer to make the search without a warrant. The circumstances generating probable cause may, however, consist of a chain of ambiguous innocent activities which coupled together would lead a reasonable officer to believe contraband is within a vehicle." *Gonzales v. State*, Okl.Cr., 525 P.2d 656 (1974). In the present case the officers had information that an elderly and ill man had been kidnapped and was being held in the trunk of an automobile. The officers had further information that the defendant's voice had been identified as the voice on the tapes demanding the ransom. Time was of the essence. Evidence shows that March 30th and 31st were cold and blustery days in the City of Tulsa, Oklahoma. At the time the officers reached the residence of the defendant, the kidnapping was at that time 24 hours old. An emergency situation was at hand. In *State v. Davidson*, 44 Wis.2d 177, 170 N.W.2d 755 (1969), the Supreme Court of Wisconsin recognized an inherent right of law enforcement officers to act promptly when the exigency of the situation calls for immediate investigation. "They had the responsibility, as well as the right, as law enforcement officers to enter the premises and were not required to seek and secure a search warrant before so doing." Upon arriving at the residence of the defendant, the officers had an opportunity to observe his demeanor and behavior and to realize that one of the "drop" locations was only a few hundred yards from the defendant's apartment. Armed with this information we find the officers had probable cause based on exigent circumstances to open the trunk of defendant's car and search same in hopes of saving a human life. The evidence shows that upon opening the trunk in the search for the victim of the kidnapping, the items seized were thus in plain view. "For the initial intrusion that brings the police within plain view of search and an article is found, not supported by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Furthermore, the Attorney General argues that even if the search in the above case was unconstitutional and therefore the items seized inadmissible there was ample evidence from which the court and jury could have found the defendant guilty of the above offense. While we have found no error in the above described search and seizure, we must also agree with the Attorney General's argument in this respect. The evidence of the victim's daughter and that of the defendant's brother standing alone would constitute a prima facie case. Recently, in *Duke v. State*, Okl.Cr., 548 P.2d 230 (1976), this Court said:

". . . An examination of the entire record reveals that sufficient competent evidence was presented at trial to support a verdict of guilty. We are also of

the opinion that even if the evidence discovered during the contemporaneous search of the automobile should have been suppressed, there was still sufficient competent evidence presented at trial to support a finding of guilt beyond a reasonable doubt. We therefore find this assignment of error to be without merit."

Because of the two reasons stated above we find the defendant's first assignment of error to be without merit.

[7, 8] The defendant next complains that the trial court erred in failing to overrule defendant's motion in limine. The defendant sought by a motion in limine to require the court to limit the State's witnesses so as to exclude the reference to the death of the victim. A murder case at that time was pending against the defendant for said death. This motion was overruled. However, the trial court recognized the potential prejudicial effect of an improper evidence being brought in which would point to other crimes the defendant may have committed, and thereupon admonished the State to caution its witnesses to stay within the limits of propriety. More important still the court also granted defendant's requested instruction number 1, which reads as follows:

"[T]he Court instructs you that you must not consider any evidence of or concerning any other alledged offense that may have been committed by the defendant except insofar as it tends to prove that the defendant committed the offense charged . . ."

The District Attorney had argued at the pretrial motion hearing on the motion in limine that it was necessary to discuss the body of the victim in order that they might tie in the projectiles recovered from his body with the .22 caliber rifle found in the defendant's trunk. The court sustained the argument of the District Attorney, stating that this was a proper element in the identification of the defendant as being connected with the crime. In *Worchester v. State*, Okl.Cr., 536 P.2d 995 (1975), this Court held that evidence of a beating administered by the defendant was admissible to establish identity of the defendant who committed a burglary. Such again was the holding in *Pruitt v. State*, Okl.Cr., 518 P. 2d 1114 (1974). We find no indication in the record that the State purposely violated the trial court's ruling to hold the evidence of murder solely for the purpose of identification of the defendant. In such a situation the trial court must weigh the probative value of the evidence with any prejudicial effect that it might have. See, *Harris v. State*, Okl.Cr., 450 P.2d 857 (1969). In light of all the precautions taken by the court, to wit: the admonishment to the state; the subsequent instruction; and, the probative value of the evidence which tended to connect the defendant with the crime, we find that the evidence was properly admitted.

[9] For his final assignment of error the defendant urges that the sentence imposed by the trial court is excessive. The defendant specifically urges that the excessive sentence was caused by the evidence of other crimes admitted into trial and by other prejudicial remarks and evidence against the defendant at said trial. We find this argument without merit. Title 21 O.S.1971, § 745, sets the punishment for the crime of kidnapping for the purpose of extortion at not less than ten years. In *Flowers v. State*, 93 Okl.Cr. 27, 258 P.2d 841 (1951), this Court looked at the maximum sentence the convicted kidnapper could have gotten and ruled that his actual sentence of a set number of years was not excessive. In *Dyer v. State*, Okl.Cr., 536 P.2d 1317 (1975), this Court was confronted with a fifty year sentence for kidnapping. In that case we held:

"Regarding the punishment assessed by the jury, it cannot be said that it was excessive. The sentence assessed the defendant was within the limits prescribed by law. This Court cannot conscientiously say that under all the facts and circumstances the sentence is so exces-

sive as to shock the conscience of the Court. . . ." (Citation omitted)

Considering all the facts and circumstances in this case we hold that this sentence is not so excessive as to require modification.

Having found no error which would justify the reversal or modification of the sentence imposed, we hold that the judgment herein rendered should be and, hereby is, *AFFIRMED*.

BRETT, P. J., and BLISS, J., concur.

Roger Edward McFARLIN, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. O-76-166.

Court of Criminal Appeals of Oklahoma.

Aug. 13, 1976.

Defendant appealed an order of the District Court, Okmulgee County, John Maley, J., revoking his suspended sentence and imposing a two-year term of imprisonment. The Court of Criminal Appeals, Bussey, J., held that the true test in the case was not whether defendant violated each and every element of the formal complaint, but rather whether or not there was competent evidence from which the court could find that defendant had violated the terms and conditions of his probation; that evidence supported a finding that defendant had violated the rules and conditions of his probation; and that defendant was not denied his constitutional rights in connection with the previous procedure whereby he was certified to stand trial as an adult.

Affirmed.

Brett, P. J., concurred in result.

1. Criminal Law ⇐982.9(5)

Fact that district attorney attached formal criminal information, charging defendant with malicious injury to property, to application for revocation of suspended sentence based on alleged violation by defendant of conditions of his probation did not mean that State was required to prove each and every element of such offense beyond reasonable doubt; "true test was whether there was competent evidence from which court could find that defendant had violated terms and conditions of his probation.

2. Criminal Law ⇐1147

Where there is competent evidence, preponderance of which shows that defendant violated rules and conditions of his probation, decision of trial court revoking probation will not be reversed unless there is obvious abuse of discretion.

3. Criminal Law ⇐982.9

Decision to grant probation lies with trial court and thus decision to revoke also lies with trial court, which may do so in its sound discretion and accord with statutory requirements and considerations of fundamental fairness.

4. Criminal Law ⇐1158(1)

In proceedings to revoke suspended sentence on basis of, inter alia, allegations that defendant violated conditions of his probation by committing offense of assault and battery with dangerous weapon, question of who was aggressor was question of fact to be determined by trial judge.

5. Criminal Law ⇐982.9(5)

Evidence, in proceedings for revocation of suspended sentence based on allegations that defendant had violated rules and conditions of his probation by committing offenses of malicious injury to property and assault and battery with dangerous weapon, supported finding that defendant had violated rules and conditions of his probation. 21 O.S.1971, § 1760.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Petitioner,

-vs-

THE DISTRICT COURT OF OSAGE COUNTY, AND/OR THE DISTRICT ATTORNEY OF OSAGE COUNTY, OR THE STATE OF OKLAHOMA, ET AL,

Respondents.

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC 15 1975
Ross N. Lillard, Jr.
CLERK

No. O-75-739

ORDER DECLINING TO ASSUME ORIGINAL JURISDICTION AND ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE, PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Kurk Kendall Johnson, has filed in this Court a pleading entitled Petition for Writ of Prohbition or Petition for Writ of Mandamus and/or Petition for Writ of Habeas Corpus praying that this Court assume original jurisdiction. The Petitioner alleges that he was convicted for the crime of Kidnapping for Extortion in the District Court of Tulsa County, Case No. CRF-75-690, and pursuant thereto was sentenced to a term of sixty (60) years imprisonment on the 19th day of September, 1975. Petitioner further alleges that the State of Oklahoma is proceeding in CRF-75-294, in which case the Petitioner is charged with Murder in the First Degree, allegedly committed during the commission of the crime of Kidnapping for Extortion in CRF-75-690, and thus the Petitioner is being placed in double jeopardy. Petitioner further contends that he has filed a petition for writ of habeas corpus or petition for writ of prohibition or petition for writ of mandamus in the District Court, Osage County, on the 28th day of October, 1975, in Case No. CRF-75-294, requesting appropriate relief and that the same has not been acted upon at this time.

The writ of prohibition may not issue to prevent inferior courts from erroneously exercising jurisdiction, but only to prohibit proceedings as to which an inferior tribunal is wholly without jurisdiction, or threatens to act in excess of jurisdiction. See State ex rel. Fallis v. Caldwell, Okl. Cr., 498 P.2d 426 (1972). We are of the opinion that the facts and circumstances as herein presented are not sufficient to invoke this Court's jurisdiction in a request for a writ of prohibition. For this reason, the petition for writ of prohibition will be dismissed.

We have further held that the scope of habeas corpus inquiry is limited to a determination of whether the trial court has jurisdiction of the subject matter, jurisdiction of the person, and authority under the law to pronounce judgment and sentence. See Myers v. State, Okl. Cr., 374 P.2d 928 (1962). We note the request in the instant petition is not within the purview of habeas corpus relief. The Petitioner is now incarcerated under a valid judgment and sentence. For this reason, the petition for writ of habeas corpus will be dismissed.

APPENDIX "B"

We lastly turn to the consideration of the instant petition as a petition for writ of mandamus concerning the allegation that a similar petition was filed in the District Court of Osage County and that the same has not been acted upon at this time. We need only observe that the similar petition was filed in the District Court of Osage County on October 28, 1975, and, although not having been acted upon at this time, we do not find that at the present time an unreasonable amount of time has expired between the filing of the petition and the Petitioner's reques[illegible] mandamus in this Court. For this reason, the petition for writ of mandamus will be dismissed. However, this will not preclude the Petitioner from seeking further relief in this Court if the District Court, Osage County, fails to act upon the petition filed in that Court in CRF-75-294 on October 28, 1975, within a reasonable amount of time from this date.

IT IS, THEREFORE, THE ORDER OF THIS COURT that the petition for writ of prohibition or in the alternative petition for writ of habeas corpus or in the alternative petition for writ of mandamus be, and hereby is, dismissed.

WITNESS OUR HANDS, and the Seal of this Court, this 15th day of December, 1975.

TOM BRETT, PRESIDING JUDGE

HEZ J. BUSSEY, JUDGE

C. F. BLISS, JR., JUDGE

ATTEST:

CLERK

JUL 2 1976
HELEN JOHNSON CHRISTENSON, Court Clerk
By ..... Deputy

Cr-75-294

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Petitioner,

-vs-

DON H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma,

Respondent.

FOR PUBLICATION

FILED
COURT OF CRIMINAL APPEALS
OF OKLAHOMA
JUN 24 1976
Ross N. Lillard, Jr.
CLERK

No. O-76-150

AUTHORIZED FOR FILING
JUN 24 1976
COURT OF CRIMINAL APPEALS

-OPINION-

PER CURIAM:

Petitioner was charged in the District Court, Tulsa County, Case No. CRF-75-690, for the offense of Kidnapping for the Purpose of Extortion in violation of 21 O.S.1971, § 745. Thereafter, on the 16th day of April, 1975, Petitioner was charged in the Osage County District Court, Case No. CRF-75-294, for the offense of Murder in the First Degree in violation of 21 O.S.Supp.1973, § 701.2. Subsequent thereto the Petitioner was tried and convicted as charged in the Tulsa County District Court and pursuant thereto was sentenced for a term of imprisonment of Sixty (60) years. To the charge of Murder in the First Degree filed in the Osage County District Court, thd Petitioner entered a plea of former jeopardy, supplemented with a Motion to Strike, pursuant to 22 O.S.1971, § 513. Upon hearing, the above named Respondent overruled the Motion which sought to strike the following words from the Osage County Information:

> ". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime of Kidnapping for the purpose of Extortion . . ."

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APPENDIX "2"

Thereafter, Petitioner filed in this Court a Petition for Writ of Mandamus, whereafter by Order of this Court oral arguments were held on the 1st day of March, 1976, and this Court assumed jurisdiction and allowed the parties time to brief the matter and stayed further proceedings in the Osage County District Court pending this Court's disposition of the instant matter.

After having heard the arguments and studied the briefs, we are of the opinion that this matter presents a question of first impression in this State. The issue for resolution is whether or not the Petitioner's prior conviction for Kidnapping for the Purpose of Extortion in Tulsa County is a bar to a subsequent prosecution for the offense of Murder in the First Degree in Osage County when the enumerated felony upon which the charge of Murder in the First Degree is predicated is Kidnapping for the Purpose of Extortion.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Such provision is made applicable to the States through the due process clause of the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 794 (1969). Article 2, § 21 of the Oklahoma Constitution likewise provides:

> ". . . Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

The scope of the Federal constitutional guarantee was discussed in North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), wherein the Court stated:

> "That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for

for the same offense after conviction. And it protects against multiple punishments for the same offense."

The Oklahoma Code of Criminal Procedure in 22 O.S. 1971, § 14, provides:

"No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and duly convicted or acquitted, except as hereinafter provided for new trials."

Also, in 22 O.S.1971, § 522, the Code reads:

"When the defendant shall have been convicted or acquitted upon an indictment or information, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information."

The elusive concept of former jeopardy has been the subject and the cause for many judicially created variations of tests to be applied in determining whether or not a constitutional proscription against double jeopardy has been violated. Having extensively examined cases from other jurisdictions we find no precedent which we consider persuasive in view of the particular and unique character of our First Degree Murder Statute, 21 O.S.Supp.1973, § 701.1. Yet, this Court in Stockton v. State, Okl.Cr., 509 P.2d 153 (1973), citing Jackson v. State, 11 Okl.Cr. 523, 148 P. 1058, observed the true test of making double jeopardy a ban is whether the evidence necessary to support a second Information would be sufficient to pronounce a legal conviction on the first.

In the instant case Petitioner has been convicted of Kidnapping for the Purpose of Extortion and a particular punishment imposed thereon. For the State to convict the Petitioner of First Degree Murder in Osage County, an essential and indispensible element in the State's proof of the charge is that

the murder was committed during the perpetration of, or attempt to perpetrate, the felony of Kidnapping for the Purpose of Extortion. Hence, the evidence necessary to support the Information of Murder in the First Degree would be sufficient to pronounce a legal conviction on the first Information, Kidnapping for the Purpose of Extortion. Thus, in the instant case the test dictates that a plea of former jeopardy must be sustained Having been previously convicted of Kidnapping for the Purpose of Extortion, such felony may not afford a basis for additional punishment under a charge of Murder in the First Degree.

For the above and foregoing reasons, we find the Petitioner's Motion to Strike should have been granted, and upon remand the Respondent is directed to act accordingly. However, we do find, as the Petitioner submits, that the previous conviction for Kidnapping for the Purpose of Extortion does not in any way prohibit a subsequent prosecution for Murder in the Second Degree, in violation of 21 O.S.Supp.1973, § 701.2.

We are constrained to note further that in analogous situations in the future, it would be advantageous for the prosecutors from different districts to consult together prior to initiating prosecutions and proceeding to trial, specifically when a former jeopardy issue is involved.

For the above and foregoing reasons, our previous Order entered on the 1st day of March, 1976, staying further proceedings in the Osage County District Court, Case No. CRF-75-294, is hereby VACATED, and the Petition for Writ of Mandamus is GRANTED, with instructions to the above named Respondent

to proceed in accordance with the views expressed herein.

AN ORIGINAL PROCEEDING IN WHICH PETITIONER SEEKS A WRIT OF MANDAMUS. WRIT GRANTED, WITH INSTRUCTIONS.

HESKELL & HESKETT,
PAWHUSKA, OKLAHOMA,
Attorneys for Petitioner,

WILLIAM HALL, DISTRICT ATTORNEY,
TENTH JUDICIAL DISTRICT,
Attorney for Respondent.

PER CURIAM.

STATE OF OKLAHOMA } SS.
COUNTY OF OSAGE }

I, HELEN JOHNSON CHRISTENSON, COURT CLERK, in and for Osage County, Oklahoma, do hereby certify that the above and foregoing is a true, correct and complete copy of the original now on file in my office at Pawhuska, Oklahoma, as the same appears of record.

Witness my hand and official seal this 12th day of April 1978

HELEN JOHNSON CHRISTENSON, COURT CLERK,
By Virginia McClintock Deputy

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
JUL 29 1976
Ross N. Lillard, Jr.
CLERK

KURK KENDALL JOHNSON,)
)
Petitioner,)
)
-vs-) No. P-76-533
)
DON H. HAMPTON, District)
Judge, Tenth Judicial District,)
and/or THE STATE OF OKLAHOMA,)
et al,)
)
Respondents.)

ORDER DISMISSING PETITION FOR REHEARING AND/OR PETITION FOR WRIT OF PROHIBITION.

Petitioner has filed in this Court a pleading titled "PETITION FOR REHEARING AND/OR PETITION FOR WRIT OF PROHIBITION, PROHIBITING A TRIAL WITHIN THE MEANING AND SCOPE OF HOUSEHOLDER V. RAMSEY, OKL.CR., 485 P.2d 247; BENTON V. MARYLAND, 395 U.S. 794; TURNER V. ARKANSAS, 407 US 366" wherein he asserts that the State of Oklahoma should be collaterally estopped from relitigating in a prosecution for Murder in the Second Degree and/or subsequent trial, as directed by this Court in Kurk Kendall Johnson vs. Don Hampton, O-76-150, those issues determined in the prior kidnapping trial arising out of the alleged same facts and circumstances.

We observe the instant petition is predicated upon this Court's holding in O-76-150. We need only note and advise the petitioner that this Court entered an Order on the 12th day of July, 1976, withdrawing, vacating and setting aside the opinion rendered in O-76-150, staying further proceedings in said case and directing supplemental briefs. For this reason the instant petition is based at most, upon speculation and anticipation as to the decision this Court will ultimately render in O-76-150. Thus the instant petition fails to allege grounds sufficient to invoke the jurisdiction of this Court and the petition will, accordingly, be dismissed.

IT IS, THEREFORE, THE ORDER OF THIS COURT the petition in the above styled and numbered cause be, and hereby is, dismissed.

WITNESS OUR HANDS, and the Seal of this Court, this 29th day of July, 1976.

TOM BRETT, PRESIDING JUDGE

BRETT, JUDGE

C. F. BLISS, JR., JUDGE

ATTEST:

Ross N. Lillard Jr.
CLERK

APPENDIX "D"

out for injuries over and above that of original injury.[7]

It is an "elementary presumption that a wrongdoer should not be relieved of responsibility for his wrong because of arrangements made between the injured person and his employer; arrangements that are no concern of his."[8]

REVERSED.

HODGES, C. J., LAVENDER, V. C. J., and WILLIAMS, IRWIN, BERRY, BARNES and SIMMS, JJ., concur.

Kurk Kendall JOHNSON, Petitioner,

v.

Don H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma, Respondent.

No. O-76-150.

Court of Criminal Appeals of Oklahoma.

May 16, 1977.

Defendant convicted in Tulsa County of kidnapping for the purpose of extortion filed petition for writ of mandamus to compel the Osage County District Court to grant his motion to strike, from an information filed in that court charging him with felony-murder in the first degree, language describing the underlying felony of kidnapping for the purpose of extortion. The Court of Criminal Appeals held that: (1) in prosecutions for felony-murder in the first degree or felony-murder in the second degree, the underlying felony is neither the same offense nor a lesser included offense since defendant is not charged with the underlying felony nor can he be convicted of the underlying felony; (2) therefore, defendant could be prosecuted for murder in the first degree notwithstanding that he had been previously convicted of the underlying felony.

Writ denied.

Brett, J., dissented and filed an opinion.

1. Homicide ⇐22(1)
Kidnapping ⇐1

Murder in first degree and kidnapping for purpose of extortion are two separate and distinct offenses as elements of first-degree murder include elements different and additional to those of kidnapping for purpose of extortion. 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2, subd. 3.

2. Homicide ⇐18(1)

In prosecution for either felony-murder in first degree or felony-murder in second degree, underlying felony is neither same offense nor is it lesser included offense, as defendant is not charged with underlying felony nor can he be convicted of underlying felony as lesser included offense. 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2, subd. 3.

3. Criminal Law ⇐200(1)

Defendant could be prosecuted in Osage County for felony-murder in first degree with underlying felony being commission of or attempt to commit offense of kidnapping for purpose of extortion, notwithstanding that he had previously been convicted in Tulsa County of said underlying felony; no former jeopardy claim was sustainable as murder in first degree is separate and distinct offense protecting different societal interest than kidnapping for purpose of extortion. 21 O.S.1971, § 745; 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2 subd. 3.

7. *Travelers Insurance Company v. Leedy*, 450 P.2d 898 (Okl.1969).

8. Larson, "Workmen's Compensation Law", P. 14-106, § 2A:72.64 (1976). Also see "Workmen's Compensation: Immunity of Physician from Tort Action for Aggravation of Compensable Injuries", 29 Okl.L.Rev. 519 (1976); Annotation at 28 A.L.R.3d 1066.

APPENDIX "E"

An original proceeding in which petitioner seeks a writ of mandamus. Writ denied and previous order of March 1, 1976, Vacated.

Heskett & Heskett, Pawhuska, for petitioner.

Larry Derryberry, Atty. Gen., Frank Muret, Asst. Atty. Gen., for respondent.

OPINION

PER CURIAM:

Petitioner was charged in the District Court, Tulsa County, Case No. CRF-75-690, for the offense of Kidnapping for the Purpose of Extortion in violation of 21 O.S. 1971, § 745. Thereafter, on the 16th day of April, 1975, Petitioner was charged in the Osage County District Court, Case No. CRF-75-294, for the offense of Murder in the First Degree in violation of 21 O.S. Supp.1973, § 701.1. Subsequent thereto the Petitioner was tried and convicted as charged in the Tulsa County District Court and pursuant thereto was sentenced for a term of imprisonment of Sixty (60) years. To the charge of Murder in the First Degree filed in the Osage County District Court, the Petitioner entered a plea of former jeopardy, supplemented with a Motion to Strike, pursuant to 22 O.S.1971, § 513. Upon hearing, the above named Respondent overruled the Motion which sought to strike the following words from the Osage County Information:

". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime of Kidnapping for the purpose of Extortion . . ."

Thereafter, Petitioner filed in this Court a Petition for Writ of Mandamus, whereafter by Order of this Court oral arguments were held on the 1st day of March, 1976, and this Court assumed jurisdiction and allowed the parties time to brief the matter and stayed further proceedings in the Osage County District Court pending this Court's disposition of the instant matter.

After having heard the arguments and studied the briefs, we are of the opinion that this matter presents a question of first impression in this State. The issue for resolution is whether or not the Petitioner's prior conviction for Kidnapping for the Purpose of Extortion in Tulsa County is a bar to a subsequent prosecution for the offense of Murder in the First Degree in Osage County when the enumerated felony upon which the charge of Murder in the First Degree is predicated is Kidnapping for the Purpose of Extortion, the prior conviction.

[1, 2] The two statutory offenses, Murder in the First Degree as charged against Johnson, and Kidnapping for the Purpose of Extortion are two separate and distinct offenses as the elements of First Degree Murder include elements different and additional to those of Kidnapping for the purpose of Extortion. A First Degree Murder prosecution under 21 O.S.Supp.1973, § 701.1, ¶ 2, necessitates the State prove that premeditated homicide was perpetrated by one committing or attempting to commit one of the four delineated felonies, or when the death occurs following the sexual molestation of a child under the age of sixteen (16) years. Proof of the particular underlying felony is required only because without it the homicide would be a lesser degree, second degree murder or manslaughter. Certainly the underlying felony in a second degree murder prosecution under 21 O.S.Supp.1973, § 701.2, ¶ 3, is separate and distinct offense than the felony murder and conviction of either would not bar prosecution and conviction for the other. See *Harris v. State*, 17 Okl.Cr. 69, 175 P. 627 (1918). For in a felony murder prosecution, such as a first degree murder prosecution under § 701.1, ¶ 2, supra, the underlying felony is required only because without it the homicide would be of a lesser degree, manslaughter, or possibly a noncriminal homicide. In either prosecution, Murder in the First Degree such as § 701.1, ¶ 2, or Murder in the Second Degree, § 701.2, ¶ 3, the underlying felony is neither the same offense nor is it a lesser included offense, as defendant is not

charged with the felony nor can he be convicted of the felony as a lesser included offense.

The evidence in the kidnapping case, *Johnson v. State*, Okl.Cr., 554 P.2d 51 (1976), established that Johnson kidnapped his victim in hopes of extorting a sum of money from the victim's relatives. The objective of extortion changed to murder after the attempts to extort the money apparently failed. The evidence does not establish that the purpose of the kidnapping was murder, but only that the purpose became murder after Johnson's extortion attempts failed and certainly the murder would also at least close the mouth of the one who could surely lead to Johnson's apprehension. Different societal interests are protected by the statutory laws prescribing kidnapping for the purpose of extortion and homicide. Certainly then two separate offenses may be committed although the offenses are proximate in time.

[3] Therefore, in the instant case Johnson may be prosecuted for Murder in the First Degree with the underlying felony being the commission of or the attempt to commit the offense of Kidnapping for the Purpose of Extortion, notwithstanding that he has been previously convicted of said underlying felony. No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. *Williams v. State*, Okl.Cr., 321 P.2d 990 (1957), *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959).

For the above and foregoing reasons, our previous order entered on the 1st day of March, 1976, staying further proceedings in the Osage County District Court, Case No. CRF-75-294, is hereby VACATED, and the Petition for Writ of Mandamus is DENIED in accordance with the views expressed herein.

BRETT, Judge, dissenting:

I respectfully dissent to this decision for the reason that as the information is laid it will become necessary to again prove all the elements of the offense of Kidnapping for the Purpose of Extortion prior to proving the alleged First Degree Murder. I believe, under the facts of this case, that the charge should be Murder in the Second Degree.

Bruce SHATTUCK, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-76-874.

Court of Criminal Appeals of Oklahoma.

May 17, 1977.

The District Court of Washington County, Arthur J. Boose, J., found defendant guilty of assault with a dangerous weapon, after former conviction of a felony, and he appealed. The Court of Criminal Appeals, Bliss, J., held that trial court did not abuse its discretion in overruling defendant's motion to strike his case from the jury term because the complaining witness' wife was allowed to remain on the jury panel for two weeks into the term, at which time her relationship with the complainant was brought to the attention of the court by a defense motion to strike the case from the jury term, where the complainant's wife had not been called to serve as a juror in any of the other trials conducted during the term, where she had been subjected to no voir dire examinations, where, upon questioning, she denied having discussed her husband's case with any of the other prospective jurors, where defendant was given the opportunity to question prospective jurors as to their knowledge of the facts of the case or their acquaintance with the complaining witness or his relatives, and where, in short, defendant could merely speculate that prejudice had influenced the verdict against him.

Affirmed.

held, even though the discharge had been upheld at the post-termination hearing.[1]

No decision of this Court is controlling on either the due process issue or the remedy issue decided by the Oregon Supreme Court. In Dixon v Love, supra, this Court held that the Illinois regulation providing for the automatic suspension of the license of a driver who had been convicted repeatedly for traffic offenses was constitutionally valid. In so holding, the Court relied on the fact that the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based," 431 US, at 113, 52 L Ed 2d 172, 97 S Ct 1723; on the fact that the suspension and revocation decisions were "largely automatic" under the Illinois regulations, ibid.; and on "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." Id., at 114, 52 L Ed 2d 172, 97 S Ct 1723. None of those factors, decisive in Dixon, has any relevance to the issues decided by Oregon Supreme Court in this case.

Indeed, in Dixon the premise for the Court's legal analysis was " 'that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' " Id., at 113, 52 L Ed 2d 172, 97 S Ct 1723 quoting Mathews v Eldridge, 424 US 319, 343, 47 L Ed 2d 18, 96 S Ct 893. Precisely the same premise provided the basis for the legal analysis of the Oregon Supreme Court. The court held that a pretermination evidentiary hearing was not required, but that "something less" was necessary—in this case, fair notice and an opportunity to respond. Whether or not that holding is correct, it is not even arguably inconsistent with either the holding or anything said by this Court in Dixon. Nor is there anything in Dixon which remotely relates to the question whether the remedy directed by the Oregon Supreme Court was proper.

In my judgment, even assuming that the Oregon Supreme Court has extended greater procedural protection to Oregon residents than the Federal Constitution requires, there is no need for this Court to address those issues until a conflict with the Oregon holding has developed on a national level. But if my judgment in this respect is incorrect, and enlightenment on a nationwide basis is indeed appropriate, surely the Court should provide something more edifying than a cryptic reference to a case as wide of the mark as Dixon v Love. This summary treatment of a carefully reasoned decision of the highest court of the State of Oregon fails to accord proper respect to that tribunal and gives no guidance whatsoever for further proceedings in this litigation. Cf. United States v Jacobs, 429 US 909, 50 L Ed 2d 277, 97 S Ct 299 (Stevens, J., concurring).[2]

I respectfully dissent.

No. 77-277. Allen Aaron Jackson, petitioner, v United States

434 US 947, 54 L Ed 2d 307, 98 S Ct 471.

November 14, 1977. On petition for writ of certiorari to the United States Court of Claims. Petition for writ of certiorari granted, judgment vacated and case remanded to the United States Court of Claims for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 25, 1977. Mr. Justice Rehnquist would deny the petition.

Same case below, 213 Ct Cl 354, 551 F2d 282.

No. 77-5161. Kurk Kendall Johnson, petitioner, v Don H. Hampton, District Judge, Tenth Judicial District of Oklahoma

434 US 947, 54 L Ed 2d 307, 98 S Ct 471.

November 14, 1977. On petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma. Motion of petitioner for leave to proceed in forma pauperis and petition for

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1. The Oregon Court of Appeals had held that respondent was entitled to a pretermination hearing, but it limited the award of back wages to the period between the date of his dismissal and the date of his subsequent hearing. 23 Ore App 743, 543 P2d 1094 (1975).

2. Although four of us disagree with the Court's disposition of this case, the Justices who join this opinion do not insist that the case be orally argued. See Trinkler v Alabama, 418 US 917, 918, 41 L Ed 2d 1160, 94 S Ct 3207 (Brennan, J. dissenting).

APPENDIX "F"

writ of certiorari granted. Judgment vacated and case remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of Brown v Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977) and Harris v Oklahoma, 433 US 682, 53 L Ed 2d 1054, 97 S Ct 2912 (1977).

Same case below, 564 P2d 641.

No. ——. Mark Trail Campgrounds, Inc., applicant, v Field Enterprises, Inc.

434 US 947, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Motion for reconsideration denied.

No. A-379. John W. Gibbs, applicant, v United States

434 US 947, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Application for stay, presented to Mr. Justice Marshall and by him referred to the Court, denied.

No. A-384. William G. Walker, applicant, v Illinois et al.

434 US 948, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Application for writ of habeas corpus, presented to the Chief Justice and by him referred to the Court, denied.

No. D-100. In the Matter of Disbarment of Owen Jennings Ooms

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Owen Jennings Ooms, of Chicago, Illinois, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on April 4, 1977, is hereby discharged.

No. D-107. In the Matter of Disbarment of Edward S. Friedland

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Disbarment entered.

No. 72, Original. State of South Dakota, plaintiff, v State of Nebraska

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Exception of South Dakota to Report of Special Master overruled. Motion of Robert J. Foley et al. for leave to intervene as defendants granted.

No. 76-682. Santa Clara Pueblo et al., petitioners, v Julia Martinez et al.

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Motion of Solicitor General for leave to file a brief, as amicus curiae, denied.

P.2d 1104 (1973). Also see *Davidson v. State*, Okl.Cr., 550 P.2d 955 (1976).

[3] For his second contention under this assignment of error the defendant alleges that there was a gap of approximately 21 days between the time the evidence was confiscated and the time it was received at the State Crime Bureau Laboratory. In support of his argument, the defendant cites as authority our recent holding in *Faulkenberry v. State*, Okl.Cr., 551 P.2d 271 (1976). However, in the *Faulkenberry* case, *supra*, the facts were essentially different. In that case there was an *unexplained* ten day gap before delivery to the State Crime Lab. In addition there was no testimony as to how the Exhibit arrived at the crime lab.

In the instant case there is no such unexplained gap and there is direct evidence as to how the substance arrived at the State Bureau. In the *Faulkenberry* case, *supra*, there was no showing at all as to where the evidence was during this ten day period. In the instant case, the evidence is clear that the substance was locked in the property room of the Fort Smith, Arkansas, Police Department and that only Officer Grizzle and Officer Yates had access to it. (Tr. 19–25). And finally, that one Jane Bates transported the substance to the State Crime Laboratory at McAlester on the 15th day of December, 1976. (Tr. 29–29).

The possibility for abuse or tampering that was present in *Faulkenberry*, *supra*, is simply not present in this case. Lapse of time is not prejudicial *per se* and doubt arises only if the passage of time is unexplained and suspicious. See *Contu v. State*, Okl.Cr., 533 P.2d 1000 (1975).

We find, therefore, that there was sufficient evidence in the chain of custody to justify the court admitting the evidence for the jury's consideration.

Finding no error which would cause this Court to either reverse or modify the judgment and sentence, we find that same should be, and hereby is *AFFIRMED*.

CORNISH and BRETT, JJ., concur.

Kurk Kendall JOHNSON, Petitioner,

v.

The Honorable Don H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma, Respondent.

No. O–76–150.

Court of Criminal Appeals of Oklahoma.

Jan. 4, 1978.

ORDER WITHDRAWING OPINION AND GRANTING WRIT OF PROHIBITION

WHEREAS, on December 19, 1977 there was filed in this Court a true copy of an order, certified by the Deputy Clerk of the Supreme Court of the United States on the 14th of December, 1977, directing that the order entered by this Court in the above styled and numbered cause on the 16th day of May, 1977 be vacated, and remanding said cause for further consideration in the light of *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187, and *Harris v. Oklahoma*, —— U.S. ——, 97 S.Ct. 2912, 53 L.Ed.2d 1054.

NOW, THEREFORE, the opinion heretofore entered on the 16th day of May, 1977 in the above styled and numbered cause is vacated and set aside, and further prosecution of Kurk Kendall Johnson in the District Court, Osage County, Case No. CRF–75–294, for the offense of Murder in the First Degree in violation of Laws 1973, c. 167, § 1 is prohibited, and the court is directed to strike from the information in that case the following language:

". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime if Kidnapping for the purpose of Extortion . . ."

This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts

APPENDIX "G"

and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in *Brown v. Ohio* and *Harris v. Oklahoma*, supra.

WITNESS OUR HANDS and the Seal of this Court this 4th day of January, 1978.

HEZ. J. BUSSEY, P. J.
TOM R. CORNISH, J.
TOM BRETT, J.

CITIZENS SECURITY BANK OF BIXBY, Oklahoma, Appellant,

v.

John L. COURTNEY and Betty J. Courtney, husband and wife, Overhead Door Company of Tulsa, Inc., a corporation, Bradley's Heating and Air Conditioning, J & R Heating and Air Conditioning Company, Painters Supply of Oklahoma, Inc., a corporation, a/k/a Pan American Paint Co., d/b/a Painters Supply Co. of Tulsa, Inc., Marvin Dorris, Jr. and Wanda L. Dorris, d/b/a Marlee Carpets, M & M Lumber Company, Plywood of Tulsa, Mager Mortgage Company, and Guaranty Loan & Investment Corporation of Tulsa, Inc., a corporation, Appellees.

No. 49745.

Court of Appeals of Oklahoma, Division 2.

Sept. 13, 1977.

Rehearing Denied Oct. 4, 1977.

Certiorari Denied Dec. 21, 1977.

Released for Publication by Order of Court of Appeals Dec. 22, 1977.

First real estate mortgagee, who had acquired property by quitclaim deed from mortgagors, brought action against mortgagors and junior lienholders for mortgage foreclosure and to quiet its title. The District Court, Tulsa County, Robert G. Green, J., entered judgment for junior lienholders, and first mortgagee appealed. The Court of Appeals, Brightmire, P. J., held that: (1) evidence was not sufficient to support finding that bank, by accepting quitclaim deed on subject realty from bankrupt mortgagors, intended that its first mortgage lien therein be merged into the title, and (2) junior lienholders were not denied due process of law.

Reversed and remanded with directions.

1. Mortgages ⇐295(1)

Evidence, in action by first real estate mortgagee, who had acquired property by quitclaim deed from mortgagors, against mortgagors and junior lienholders for mortgage foreclosure and to quiet its title, was not sufficient to support a finding that first mortgagee, in accepting a quitclaim deed, intended that its first mortgage lien thereon be merged into title.

2. Mortgages ⇐295(1)

The so-called doctrine of "merger" whereby a mortgage lien remains in effect even after mortgagee obtains legal title if mortgagee's intent is that the lien remain in effect is an exception to common-law rule that when two legal estates meet in the same person a merger takes place. 42 O.S.1971, § 22.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mortgages ⇐295(1)

Equity's merger inhibiting intervention when a mortgagee acquires legal title is aimed at doing subatantial justice and it is not available to aid in perpetrating a fraud or other unconscientious wrong.

4. Mortgages ⇐295(1)

Where it was to advantage of first mortgagee that its quitclaim deed to mort-

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
MAR 9 1978
Ross H. Lillard, Jr.
CLERK

KURK KENDALL JOHNSON,)
Petitioner,)
-vs-) No. P-78-101
DON H. HAMPTON, District Judge of the Tenth Judicial District of the State of Oklahoma,)
Respondent.)

ORDER DECLINING TO ASSUME JURISDICTION
AND DISMISSING PETITION
FOR WRIT OF PROHIBITION

Kurk Kendall Johnson has filed an application for Writ of Prohibition to prohibit the Honorable Don Hampton from proceeding to trial in Case No. CRF-75-294 wherein Petitioner is charged with the offense of Murder in the Second Degree. Petitioner alleges that by reason of his conviction for the crime of Kidnapping for the purpose of Extortion in the District Court, Tulsa County, Case No. CRF-75-690 the State is barred from further prosecution for the crime of Murder in the Second Degree and under the authority of Brown v. Ohio, ____U.S.____, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris v. Oklahoma, ____U.S.____, 53 L.Ed.2d 1054, 97 S.Ct. 2912, we are of the opinion that the issue sought to be raised is properly reviewable on appeal and therefore decline to assume jurisdiction without prejudice with this issue being properly presented on appeal in the event Petitioner is convicted.

THE COURT THEREFORE declines to assume jurisdiction and DISMISSES the Petition for Writ of Prohibition.

WITNESS OUR HANDS, and the Seal of this Court, this 9th day of March, 1978.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

CLERK

APPENDIX "H"

area was stopped by a deputy, who noticed bolt cutters and a gun in plain view. The driver was arrested and an inventory search of the vehicle revealed the defendant's billfold and identification. We find this contention to be meritless for two reasons. First, the defendant lacks standing to challenge the search because he asserted neither a property nor possessory interest in the car, nor an interest in the property seized. See *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), reh. den. 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83. Second, the search and seizure was lawful because the evidence was discovered in plain view after an investigatory stop. See *Baledge v. State*, Okl.Cr., 554 P.2d 1388 (1976).

[7] The defendant's final assignment of error is that the prosecutor improperly suggested to the jury a definition of reasonable doubt in closing argument, saying, "you have a very plain duty to do here, to arrive at a reasonable conclusion that this defendant is guilty of the crime as charged." We find the defendant's argument to be without merit. The prosecutor was clearly arguing that it would be a reasonable conclusion for the jury to find the defendant guilty. We find this type of argument to be well within the bounds of proper closing argument.

The judgment and sentence is *AFFIRMED*.

CORNISH, P. J., and BRETT, J., concur.

KEY NUMBER SYSTEM

Kurk Kendall JOHNSON, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-78-516.

Court of Criminal Appeals of Oklahoma.

May 21, 1980.

Defendant was convicted in the District Court, Osage County, Don H. Hampton, J., of second-degree murder, and he appealed. The Court of Criminal Appeals, Cornish, P. J., held that: (1) defendant waived his claim that his rights against double jeopardy were violated; (2) by failing to object at trial, defendant waived any claim of error in connection with trial court's evidentiary rulings; (3) the verdict forms were not defective; and (4) even if error occurred when the prosecutor made reference to the death penalty during closing argument, the error did not violate a substantial right of defendant.

Affirmed.

Bussey, J., specially concurred and filed opinion.

1. Criminal Law ⇐161

The double jeopardy clauses of the Oklahoma and Federal Constitutions are intended to protect against two distinct abuses; the first is requiring an accused to endure a series of trials for the same offense and the second is the infliction of multiple punishments for a single offense. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

2. Criminal Law ⇐195(1)

In dealing with those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode, a reviewing court must consider both aspects of the prohibition against double jeopardy, i. e., the prohibition against requiring an accused to endure a series of trials for the same offense and the prohibition against inflicting multi-

APPENDIX "I"

ple punishments for a single offense. U.S. C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

3. Criminal Law ⇐196

For purpose of determining whether an accused has been twice placed in jeopardy for the same offense by being required to undergo a multiplicity of trials for that offense, the appropriate test is the "same transaction" test; however, the protection against multiplicity of punishment is separate and independent and, even when the "same transaction" test mandates a single trial, use of the "same evidence" test could result in finding that the defendant could be punished separately for each of the offenses involved. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

4. Criminal Law ⇐196

The fact that the Court of Criminal Appeals treats the double jeopardy issue in one case by using the "same transaction" test does not mean that the Court will not apply the other relevant test, i. e., the "same evidence" test, in appropriate cases. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

5. Criminal Law ⇐618

While defendant could be punished separately for second-degree murder and kidnapping for the purpose of extortion, both crimes should have been adjudicated in a single trial where the crimes were part of a single criminal episode and the circumstances were such that both charges could have been tried in Osage County.

6. Criminal Law ⇐1030(2)

Public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to assert alleged denials of constitutional protections.

7. Criminal Law ⇐105

Lack of jurisdiction is never waived and can be raised at any time.

8. Criminal Law ⇐204

Double jeopardy protections can be waived by failure to assert them at a timely stage. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

9. Criminal Law ⇐204

Where, though murder and kidnapping cases were in process at the same time, defendant did not raise double jeopardy issue until the kidnapping case had been completed and in fact succeeded in postponing his trial on the murder charge until the kidnapping trial was over and where, had the issue been timely raised, the kidnapping charge could have been dismissed in Tulsa County and filed in Osage County so that the two charges could have been tried together, defendant waived his double jeopardy claim. U.S.C.A.Const. Amend. 5; O.S. 1971 Const. art. 2, § 21.

10. Criminal Law ⇐698(1)

Failure to object to evidence admitted at trial is a waiver of any error arising from such admission.

11. Criminal Law ⇐698(1)

Evidence admitted at trial without objection may properly be considered by the jury.

12. Criminal Law ⇐798½

Verdict forms were not defective because they provided the alternatives "guilty" and "not guilty" rather than "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt" where, in his instructions to the jury, the trial judge specified the burden of proof numerous times and expressly told the jury that if they could not find beyond a reasonable doubt that defendant was guilty, then they were obliged to find him not guilty.

13. Criminal Law ⇐730(14)

Prosecutor's reference to the death penalty during closing argument, if error at all, did not violate a substantial right of defendant where the trial court properly instructed the jury with regard to the sentence to be imposed for second-degree murder.

An appeal from the District Court, Osage County; Don H. Hampton, Judge.

Kurk Kendall Johnson, appellant, was convicted of the offense of Second Degree Murder; was sentenced to ten (10) years' to life imprisonment, and appeals. AFFIRMED.

Bill L. Heskett, Heskett, Heskett, Daniel & Esser, Pawhuska, for appellant.

Jan Eric Cartwright, Atty. Gen., David W. Lee, Asst. Atty. Gen., Timothy S. Frets, Legal Intern, for appellee.

OPINION

CORNISH, Presiding Judge:

The appellant was arrested on March 31, 1975, for the kidnapping of Earl Edward Bell. The authorities later discovered that Bell had been murdered. Because it appeared that the abduction occurred in Tulsa County, the appellant was charged in the Tulsa County District Court, Case No. CRF-75-690, with the crime of Kidnapping for the Purpose of Extortion. He was also charged with the crime of First Degree Murder in the District Court of Osage County, Case No. CRF-75-294, where the body was found.

Preliminary hearings were held and the appellant was bound over on both charges. On September 3, 1975, the appellant moved for a continuance of the murder trial in Osage County until after the conclusion of the Tulsa County trial on the kidnapping charge. The motion was granted. On September 5, 1975, the appellant was convicted by a Tulsa County District Court jury of Kidnapping for the Purpose of Extortion. He was sentenced to sixty (60) years' confinement. On appeal this Court affirmed the conviction. See *Johnson v. State*, Okl.Cr., 554 P.2d 51 (1976), *cert. denied*, 429 U.S. 943, 97 S.Ct. 364, 50 L.Ed.2d 314 (1976). Thereafter, the appellant was convicted of Murder in the Second Degree in the District Court of Osage County. Punishment was fixed at ten (10) years to life imprisonment.

I

In this appeal of his murder conviction, the appellant raises the issue of double jeopardy. He argues that the murder and the kidnapping were parts of a single criminal episode and that, therefore, the kidnapping conviction barred the murder trial.

A

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the appellant entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the crime of kidnapping from the information for first degree murder. The motion was denied. The appellant then petitioned this Court for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. This Court, in a per curiam opinion, denied the writ, stating:

". . . No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. *Williams v. State*, Okl.Cr., 321 P.2d 990 (1957), *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959)." *Johnson v. Hampton*, Okl.Cr., 564 P.2d 641 (1977), 11 A.L.R.3d 840 (Supp.1979).[1]

The United States Supreme Court granted certiorari, vacated this Court's order denying the writ of mandamus, and remanded for further consideration with particular attention to *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See *Johnson v. Hampton*, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand this Court held that the crime of first degree murder, as charged, necessarily included the lesser offense of kidnapping for the purpose of extortion. We prohibited the trial of the appellant as originally charged, but further stated:

1. For cases from other jurisdictions, see Annot. "Earlier Prosecution for Offenses During which Homicide was Committed as Bar to Prosecution for Homicide." 11 A.L.R.3d 834 (1967).

"This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in *Brown v. Ohio*, and *Harris v. Oklahoma*, supra." *Johnson v. Hampton*, Okl.Cr., 572 P.2d 1301 (1978).

Subsequently, over the appellant's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

B

The first assertion of error is the trial court's denial of the appellant's renewed motion to dismiss based on the plea of double jeopardy. The appellant urges us to apply the rule sometimes referred to as the "same transaction test." Under that rule a person cannot be held to answer for separate crimes at consecutive trials when the separate crimes were parts of a single criminal episode.

Generally, as noted in *Gowler v. State*, Okl.Cr., 589 P.2d 682 (1979), in determining the viability of a double jeopardy claim, the courts have utilized two tests referred to as (1) the "same evidence test" and (2) the "same transaction test," or a variation of the two. The "same evidence test" was initially employed in the English case of *Rex v. Vandercomb and Abbott*, 2 Leach 707, 168 Eng.Rep. 455 (1796). *Morey v. Commonwealth*, 108 Mass. 433 (1871), stated the rule in the first case to apply the rule in this country:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction or sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Traditionally, the test employed to determine whether a person has been placed in jeopardy twice for a single offense has been to ask whether each of the offenses charged requires proof of an additional fact that is not necessary to the other. Thus, a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy, even though each offense may arise from the same act or criminal episode. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Collins v. State*, 70 Okl.Cr. 340, 106 P.2d 273 (1940).

We find no consistent solution to the problem in examining prior cases from this Court. The same is true when we look to other jurisdictions. The United States Supreme Court has not said any one test is required by the Fifth Amendment.

Extensive research on this question indicates that the "same evidence test" is utilized by a majority of state and federal courts.[2] However, the problem is that with the proliferation of separately defined substantive crimes by the state legislatures the number of substantive offenses that may arise from a single criminal transaction has increased markedly. Thus, mechanical application of the "same evidence test" results in a decrease in the double jeopardy protection.

Critics of the same evidence test include in their ranks current members of the United States Supreme Court. In *Ashe v. Swenson*, 397 U.S. 436, 451, 90 S.Ct. 1189, 1198, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion in which Justices Douglas and Marshall joined, made a scathing attack upon the same evidence test, finding that it "virtually annuls the constitutional guarantee." He further said:

". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition

2. *Twice in Jeopardy*, 75 Yale L.J. 262 (1965).

of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." (Citations omitted, footnotes omitted)

Other critics and modern writers maintain that the proper test to determine whether a person has been twice placed in jeopardy for a single offense is to ask whether the offenses charged were parts of the same criminal act, occurrence, episode or transaction.[3] If the answer is in the affirmative, then multiple prosecutions or punishments should be barred by the Double Jeopardy Clause. It is urged that the "same transaction test," by consolidating in one lawsuit all issues arising out of a single transaction, best promotes justice, economy and convenience.

The "same transaction test" has been adopted in some states by statute.[4] A few states have adopted the test by court decision.[5] It is also interesting to note that in England, where the "same evidence test" derived, the House of Lords indicated in 1964 that joinder of offenses arising out of the same transaction would be required in the future. *Connelly v. Director of Public Prosecutions*, A.C. 1254 (1964).

We would also point out that the "same transaction test" as viewed by Justice Brennan does not necessarily preclude a defendant from being convicted and punished for each offense joined. *Abbate v. United States*, 359 U.S. 187, 198, 79 S.Ct. 666, 672, 3 L.Ed.2d 729 (1959). Thus, it is possible to apply the "same transaction test" to determine when offenses should be joined, yet apply the "same evidence test" to determine whether the defendant can be subjected to separate convictions and punishments for the offenses joined. *Commonwealth v. Campana*, 452 Pa. 233, n. 5, 304 A.2d 432, n. 5 (1973).

Utilizing this test, this Court has held that separate crimes were in fact committed when two or more crimes were committed within the same brief span of time. *Starnes v. State*, Okl.Cr., 507 P.2d 920 (1973). Also, where crimes against separate and distinct persons were involved, we have held that, even though the crimes were a part of one criminal episode and were similar in nature, prosecution for each separate offense was not barred. *Jennings v. State*, Okl.Cr., 506 P.2d 931 (1973).

C

[1] Much of the confusion surrounding the double jeopardy concept arises from the injustice of applying either test, to the exclusion of the other, in all cases. In this regard, it must be recognized that the Double Jeopardy Clauses of our State and Federal Constitutions are intended to protect against two distinct abuses. The first is requiring an accused to endure a series of trials where the same offense is charged; the second of these is the infliction of multiple punishments for a single offense. *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A clear understanding of these distinct functions of the Double Jeopardy Doctrine makes clear the undesirability of adopting either the "same evidence test" or the "same transaction test" to the exclusion of the other. An analysis of past decisions of this Court reveal what we believe to be a proper working relationship between the two tests.

In the case of *Starnes v. State*, supra, the defendant was charged with robbery by force and attempted rape, with both offenses arising out of one criminal episode. He pleaded guilty to both charges, and concurrent sentences were imposed. On ap-

3. Note, Criminal Law: *The Same Offense in Oklahoma—Now You See it, Now You Don't*, 28 Okl.L.Rev. 131 (1975); *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432, 435, 436 (1973); *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972); Noe, *Criminal Law—Double Jeopardy—Should "Offense" be Defined in Terms of Substantive Law?*, 38 Mo.L.Rev. 528, 530 (1973); Note, *The Protection Against Multiple Trials*, 11 Stan.L.Rev. 735 (1958).

4. See N.Y.Crim.Proc.L. 40.20(2); 40 Minn. Stats.Anno. 609.035.

5. *State v. Ahuna*, 52 Haw. 321, 474 P.2d 704 (1970).

peal, the defendant contended that the offenses arose out of the same event and that, therefore, it was error to convict the defendant of two separate offenses. The aspect of double jeopardy involved in *Starnes* was the protection against multiple punishments for a single offense. In upholding the imposition of separate punishments, this Court employed the "same evidence test," finding that the robbery and the attempted rape were two separate and distinct offenses, consisting of different elements. Application of the "same evidence test" under the facts of *Starnes* does not, however, necessarily imply that the "same transaction test" cannot be applied to other factual circumstances.

In *Lawson v. State*, Okl.Cr., 484 P.2d 900 (1971), the defendant broke into the victim's home with the intent to commit larceny. When confronted inside the home, he robbed the victim at gunpoint. The defendant was tried and convicted of armed robbery and was later convicted of burglary. On appeal the burglary conviction was reversed. The Court held that the same evidence was used in both trials. In ruling that there could not be separate trials for the burglary and the robbery, this Court employed the "same transaction test" to determine that the defendant had been tried twice for a single offense.

The conclusion to be reached after a careful analysis of *Starnes* and *Lawson* is that this Court has not accepted either the "same evidence test" or the "same transaction test" exclusively. Rather, recognizing the distinct functions of the Double Jeopardy Doctrine, this Court has adopted the test that would most advance the interests of justice in each particular case.

Following this view, we have held that where a defendant robbed a drugstore, taking money and narcotics, and was arrested four hours later in possession of narcotics, consecutive trials and convictions for armed robbery and possession of narcotics were not barred by the Double Jeopardy Doctrine. *Ryan v. State*, Okl.Cr., 473 P.2d 322 (1970). In a special concurrence, it was emphasized that the distinguishing features in the case were the time and location of the two offenses, the implication being that had the narcotics offense not been carried over to a distant time and place the result would have been different. Compare *Hochderffer v. State*, 34 Okl.Cr. 215, 245 P. 902 (1926), where the elements of time and location were the same. On the other hand, where two defendants kidnapped the victim and, with a third defendant, then committed rape of the same victim, we found that the act of kidnapping the victim was but a part of the force requisite to the greater offense of rape. We held that the defendants could not be punished for both kidnapping and rape, which was one transaction. *Brumbelow v. State*, Okl.Cr., 488 P.2d 1298 (1971).

Perhaps some confusion has resulted from our opinion in *Smith v. State*, Okl.Cr., 486 P.2d 770 (1971). There, the defendant was charged with robbing a taxi driver at knife point, taking the victim's money after stabbing him once in the neck and twice in the chest. The defendant was first convicted of assault and battery with a deadly weapon with intent to kill, and that conviction was affirmed. See *Smith v. State*, Okl.Cr., 481 P.2d 804 (1971). At a later trial, the defendant was convicted of robbery with a dangerous weapon, and on appeal, he raised a double jeopardy question. A strict application of the "same evidence test" would not have required a reversal because the intent to kill is not an element of robbery and, conversely, assault with intent to kill does not require the taking of property from the victim. However, this Court reversed the robbery conviction, holding that separate trials could not be held on the robbery and assault charges.

Smith v. State, supra, could be read to imply that 21 O.S. 1971, § 11,[6] mandates

6. Title 21 O.S.1971, § 11, provides:

"If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that

application of the "same transaction test" exclusively when construing Art. 2, § 21,[7] of the Oklahoma Constitution. We intended no such implication, and the cases cited do not support that conclusion. In *Smith* this Court cited *State v. Mendoza*, 107 Ariz. 51, 481 P.2d 844 (1971), in which the defendant committed a forcible rape after threatening the victim with a knife. At a single trial, the defendant was convicted of the crimes of assault with a deadly weapon and first degree rape. The Arizona Supreme Court affirmed the rape conviction and reversed the conviction for assault with a deadly weapon. In so doing, the Court stated:

"In a recent opinion of this Court, wherein the defendant was charged with attempted kidnapping while armed with a gun, Count I, and assault with a deadly weapon or instrument, to wit: a gun, Count II, both offenses or counts arising out of the same act, our Court stated that the 'practical test is to eliminate the elements in one charge and determine whether the facts left would support the other charge.' *State v. Mitchell*, 106 Ariz. 492, 478 P.2d 517, 520 (1970). In the instant case, it is clear that the element of force or violence necessary to the crime of 1st degree rape was supplied by the fear of personal violence induced by the defendant's usage of a deadly weapon, to wit: the knife, and without such usage that the element of 1st degree rape would not exist. . . ." (Citation omitted)

• • • • • •

"We do not by this opinion hold that there cannot be fact situations wherein a person may be convicted of both assault and 1st degree rape. That determination must be made on a case to case basis. We do hold that under the facts in this case the two convictions and sentences cannot stand together. . . ." (Citations omitted)

From the language, it is clear that the Arizona Court utilized the "same evidence test" in deciding the double jeopardy issue.

In *People v. Ridley*, 63 Cal.2d 671, 47 Cal.Rptr. 796, 408 P.2d 124 (1965), also cited in *Smith v. State*, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder and first degree robbery. At a single trial, the defendant was convicted of both offenses. Use of the "same evidence test" resulted in a finding that the assault was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery. Therefore, the defendant could be punished for any one of the offenses, but not for more than one. There was only a single offense, and the defendant could not be tried twice for it. *In re Henry*, 65 Cal.2d 330, 54 Cal.Rptr. 633, 420 P.2d 97 (1966), presented the Court with the same issue, and the same rationale was employed in an opinion by Chief Justice Traynor.

Both Arizona and California have statutes similar to 21 O.S.1971, § 11. See Ariz. Rev.Stats., § 13-1641, and the California Penal Code, § 654. See also *Wildman v. State*, 42 Ala.App. 357, 165 So.2d 396 (1963).

While a few states have adopted the same transaction standard as a matter of state law, it has not been applied as a federal constitutional requirement. As noted in *Cousins v. State*, 277 Md. 383, 354

offense and the punishment thereof, shall be governed by the special provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can [it] be punished under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other." (Footnote omitted)

7. Art. 2, § 21, of the Oklahoma Constitution, provides:

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

A.2d 825 (1976), the majority of states have not adopted the "same transaction test" but have continued to apply the "same evidence test" for defining whether two offenses are the same for double jeopardy purposes. Cited therein as rejecting the "same transaction test" is *Kupiec v. State*, Okl.Cr., 493 P.2d 444, 446 (1972).

In *Kupiec* the defendant forced his way into a house, took various items of personal property, and raped one of the residents. There were separate trials for armed robbery and rape, with evidence of both crimes being presented at both trials. The defendant's double jeopardy argument was rejected, using a strict "same evidence" approach. The Court said that the armed robbery and the rape were clearly separate and distinct crimes and that the proof required for each was quite dissimilar. The "evidence of other crimes" issue was also raised, but it was treated by the Court's saying that evidence of other crimes was properly admitted in both cases as part of the res gestae.

D

In reaching what we believe to be a reasonable approach to this complex issue, we note that the cases raising double jeopardy claims come within a few broad categories. In one category, are those cases in which, in a single trial, a defendant is convicted of two offenses arising from the same general criminal episode. In such cases we have generally held that the interests of justice are best served by application of the "same evidence test" to determine the propriety of multiple charges. In another group are those cases in which a defendant is convicted of two crimes, one of which is, as a matter of law, a necessary element of the other. Here, whether there was one trial or two, application of either test will result in one conviction being vacated.

[2–4] The preceding categories are the black and white groups. In the gray category are those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode. In dealing with these cases, an appellate court must consider both aspects of double jeopardy discussed above: More than one trial for a single offense and more than one punishment for a single offense. We believe that the protection against multiplicity of *trials* is best advanced by application of the "same transaction test." However, the protection against multiplicity of *punishments* is a separate and independent question; and even where the "same transaction test" mandates a single trial, application of the "same evidence test" could result in a holding that a defendant could be punished separately for each of the offenses involved. In this connection, we again remind prosecutors of the special concurring opinion attached to *Dodson v. State*, Okl.Cr., 562 P.2d 916 (1977), in which Judge Brett explained that where a series of acts is involved, an accused can be charged with several counts in a single information.[8] It should not be inferred that because we treat the double jeopardy issue in one case by using one test this Court will not apply the other test in appropriate cases.

By this opinion we do not, in the words of Mr. Chief Justice Burger, find ourselves "endowed with a perception all our predecessors lacked and in an area of the law encountering no new facts." See the dissenting opinion by Burger, C. J., in *Ashe v. Swenson*, supra, 397 U.S. at 464, 90 S.Ct. at 1204. Instead, we merely follow the collective wisdom of this Court's prior decisions and elect that course which allows this Court to utilize the necessary tools to accomplish the task before it. In taking this course, we do nothing more than elevate the distinct purposes of the Double Jeopardy Doctrine to the equal dignity and reverence each deserves.

[5] This reasoning leads us to conclude that while the appellant herein could be punished separately for Murder in the Second Degree and Kidnapping for the Pur-

8. Further, pursuant to 22 O.S.1971, § 439, if it appears that a defendant or the State is prejudiced by joinder of offenses in an indictment or information, the court shall order an election or separate trial of counts or provide whatever other relief justice requires.

pose of Extortion, both crimes should have been adjudicated in a single trial. The murder charge could not have been tried in Tulsa County because of a lack of venue; however, because kidnapping is a continuing crime, both charges could have been, and should have been, tried in Osage County.[9]

[6–9] On the other hand, public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to begin asserting alleged denials of constitutional protections. There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time. This is not true of the double jeopardy protection. See *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Although both the murder and the kidnapping cases were in process at the same time, the appellant did not raise the double jeopardy issue until the case in Tulsa County (kidnapping charge) had been completed. In fact, he succeeded in postponing the Osage County case (murder charge) until the other one was over. Had the issue been raised in the beginning, the kidnapping charge could have been dismissed in Tulsa and filed in Osage County, so that the two charges could have been tried together; whereas enforcement of the double jeopardy protection in accordance with the appellant's strategy would have barred prosecution of the appellant on one of the charges. This Court, accordingly, holds that the appellant waived his double jeopardy protection.

II

[10, 11] The appellant next asserts that the trial court erred in overruling defense counsel's motion to suppress and his demurrer to the evidence. He asserts the verdict is unsupported by the evidence. As each item of evidence was introduced at trial the defense attorney responded, "No objection." The failure to object to evidence admitted at trial is a waiver of any error that such admission might have constituted. *Box v. State*, Okl.Cr., 541 P.2d 262 (1975). The logical implication of the failure to object is that the appellant acquiesced in the court's ruling on the motion to suppress. It follows that the appellant's assertion is also without merit because evidence admitted at trial without objection may be properly considered by the jury.

III

[12] We next consider the allegation that the verdict forms were defective. The appellant insists that the usual verdict forms slur over the State's burden of proof: instead of forms for finding an accused "guilty" or "not guilty," he proposes that the forms should read "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt." In his instructions to the jury, the judge specified the burden of proof numerous times; and he expressly told the jury that if they could not find beyond a reasonable doubt that the appellant was guilty, then they were obliged to find him not guilty. The appellant's argument is unsound.

IV

The final assertion of error is that the prosecutor's closing argument was improper. Specifically, the appellant contends that in referring to the testimony of the appellant's brother relative to a telephone conversation between the appellant and his brother, the prosecutor recounted, "Find Duck. Tell him if he is any kind of cousin he will find that body and get rid of it because if he don't, I'll get the electric chair." The prosecutor then continued, "They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body . I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there."

9. Or, had there been no kidnapping charge in another county, the Osage County District Attorney could have forgone the kidnapping charge and filed a single charge of murder.

[13] The appellant contends that this reference to the death penalty during closing argument was so prejudicial to the appellant as to require a reversal. We do not agree. The trial court properly instructed the jury with regard to the sentence to be imposed upon a conviction for second degree murder. In view of the proper instruction of the court, the complained of error in the prosecutor's closing argument, if error at all, did not violate a substantial right of the accused.

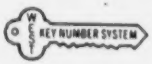
The judgment and sentence is *AFFIRMED.*

BRETT, J., concurs.

BUSSEY, J., specially concurs.

BUSSEY, J., specially concurring:

The offenses of kidnapping and murder in the second degree are separate and distinct crimes under the facts of this case. *Cf.* 21 O.S.Supp.1976, § 701.8, ¶ 2, and *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). A conviction for one should not bar the prosecution and conviction of the other. In summary, each of these charges requires the proof of at least one and, in fact, several facts or elements that proof of the other does not so require. The Double Jeopardy Clauses of the state and federal constitutions are not offended by separate prosecution and punishment here. See *Clay v. State*, Okl.Cr., 593 P.2d 509 (1979), and *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5161

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

REPLY BRIEF TO ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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No. 80-5161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

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Pursuant to this Court's Rule 22.5 petitioner hereby respectfully submits a Reply Brief addressed to arguments first raised in the Brief in opposition filed herein by Respondent, State of Oklahoma.

Petitioner is hereinafter referred to as "Johnson", and Respondent is hereinafter referred to "Oklahoma".

JURISDICTION

Oklahoma has not questioned this Court's jurisdiction or the timely filing of this petition by Johnson.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

REPLY TO OKLAHOMA'S ARGUMENT

I. Oklahoma's first points are:

(A) By failing to invoke the proper appelate procedure to adequately protect his double jeopardy guarantees;

(B) By failing to apply for a change of venue for the purpose of joining the informations for trial; and

(C) By moving for and receiving a continuance of his murder trial until his kidnapping trial has been completed.

(A) For the very first time ever in these proceedings the State of Oklahoma, in its opposition brief, urges that Johnson waived his right to assert double jeopardy. Oklahoma takes said position notwithstanding:

That Johnson objected to the First Degree Murder charge before the trial court, filed a writ before the Oklahoma Court of Criminal Appeals and successfully obtained a writ of certiorari before this Court, reversing the lower Courts;

That upon Oklahoma seeking to prosecute Johnson upon Second Degree Murder, he consistently prior to and through the trial proceedings urged and preserved the double jeopardy question; and

That petitioner urged the question of double jeopardy again before the Oklahoma Court of Criminal Appeals when he took a timely appeal from the judgment and sentence in the trial court.

Oklahoma claims that the Oklahoma Court of Criminal Appeals held that Johnson had "waived" any claim of double jeopardy. This assumption is apparently based upon that court's dicta and citation of Jeffers vs. United States, 432 U. S. 137, 53 L.Ed. 2d 168, 97 S.Ct. 2207 (1977), and totally ignores the well established Oklahoma law that the constitutional guaranty against double jeopardy is not waived, where a defendant before judgment interposes a proper plea thereto. See Mowels vs. Oklahoma, 52 Okla.Cr. 191, 11 P.2d 206 (1932); and Jackson vs. Oklahoma, 11 Okla.Cr. 523, 148 Pac. 1058 (1915). Further, the Oklahoma Court of Criminal Appeals in Ex parte Zeligson, 47 Okla.Cr. 45, 47, 287 Pac. 731, 732 (1930), clearly set forth Oklahoma's procedural law regarding the question. Same is, in part, as follows:

> "This court is committed to the doctrine that former jeopardy and former conviction, to be made available as a plea to bar a further prosecution, must be presented in the trial court, the overruling of such plea being error reviewable by direct attack by an appeal and that the judgment of conviction after jeopardy is a voidable judgment as distinguished from a void judgment; that former jeopardy may be waived by a defendant, and is waived, when not interposed in the trial court or raised in the course of the trial." [Emphasis added.]

It is abundantly clear that Johnson followed the aforesaid doctrine and there was not a "waiver" of his former jeopardy plea.

(B) Regardless of the foregoing, this Court in Young vs. Ragen, 337 U.S. 235, 93 L.Ed. 133, 69 S.Ct. 1073 (1949),

states, "It is not simply a question of state procedure when a state closes the door to any consideration of a claim of denial of a federal right." Whether a federal constitutional right is waived is a matter for ultimate decision by this Court. In Parker vs. Illinois, 333 U.S. 571, 574, 92 L.Ed. 886, 68 S.Ct. 708 (1948) (reh.den. 334 U.S. 813, 92 L.Ed. 1744, 68 S.Ct.1014), this Court stated:

> "When federal rights are involved it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them."

Here, the criminal procedural doctrine as to pleas of former jeopardy were followed and neither the Oklahoma Court of Criminal Appeals nor the respondent Oklahoma should be allowed to change the rules "after the ball game."

In furtherance of its argument of "waiver", Oklahoma argues that Johnson should have sought a change of venue for the purposes of joining the informations for trial. It cites as authority Title 22, Section 438 of the Oklahoma Statutes. However, Title 22, Section 445 of the Oklahoma Statutes places the burden upon the prosecuting attorney or the State's judiciary and reads:

> "In all criminal cases pending in any county where the venue properly lies in another county, the court may, upon motion of the county attorney, or upon its own motion, transfer such cause to the county of proper venue; such transfer, in all respects, shall be made in the manner provided by law."

The venue of the kidnapping charge could have clearly been transferred to Osage County by Oklahoma. See 22 Okla. Stat. § 126.

The Court is respectfully reminded that Johnson is and has been at all times an indigent. Under this Court's requirements in Gideon vs. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) Oklahoma was required to appoint counsel. It did so. The Public Defender in the Tulsa County case and one of the co-counsel in the present petition, for the Osage County case.

There were two separate and distinct defense counsel, through no fault of Johnson, which, of course, results in little coordination. Johnson should not be penalized for Oklahoma's counsel-appointment system especially where the Tulsa County judiciary and either prosecuting attorney could have remedied same as above pointed out. Since the foregoing was not done, it seems apparent that the prosecutors wanted two chances at Johnson, hoping for convictions on both which would run consecutive rather than concurrent.

(C) Oklahoma relies heavily on the Jeffers Case, supra, which Johnson submits is clearly distinguishable. This Court in that case was faced with the issue of whether Jeffers had waived a claim of former jeopardy by successfully opposing a government motion to consolidate indictments for two separate offenses arising out of the same transaction. As hereinbefore pointed out, Johnson never opposed consolidation because Oklahoma decided not to combine the venues.

Oklahoma contends further that Johnson waived his double jeopardy plea when he asked for a continuance. The first continuance in the case was during the preliminary and obtained by Oklahoma. Johnson's motion for continuance was filed on the 3rd day of September, 1975, the same day that Johnson's kidnapping trial commenced in Tulsa County. Obviously, the delay resulting from Johnson's motion for continuance is inconsequential. The homicide trial would have clearly come after the kidnapping trial and Johnson submits it could not matter whether that was two weeks thereafter as scheduled or three years after the kidnapping trial as was the fact.

This point has no validity. Johnson submits that Oklahoma cannot be serious for if it was it would have made this contention the first time Johnson came before this Court.

With or without the continuance, the double jeopardy question would still exist.

II. Oklahoma's second points are:

> No substantial federal question exists for (1) "the same transaction test" does not apply, and (2) application of "the same transaction test" would not yield a different result.

Space does not permit Johnson's reiterating his position relating to the proper constitutional standard being the "same transaction" test, the necessity of one constitutional standard relating thereto and the intent of the founding fathers. Suffice it to say here that not only does the "same evidence test" depart from the founders' intent, there are infinite substantive offenses that could arise from a single criminal episode or "transaction", thereby decreasing "double jeopardy protection." See Johnson vs. Oklahoma, Okla.Cr., 611 P.2d 1137 (1980).

Oklahoma contends that the "same transaction" test, if applicable, would not apply. It relies on the exceptions to said "same transaction" test suggested by Justice Brennan in his dissenting opinion in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970). Same are:

(1) A separate prosecution should be allowed when a crime is not completed or discovered, despite diligence on the part of the State, until after the commencement of a prosecution for other crimes arising from the same transaction; and

(2) If no single court has jurisdiction of all the alledged crimes.

The victim was kidnapped on the 30th day of March, 1975, and was, according to the prosecution's evidence, killed the next day. Johnson was arrested in the evening that second day. The police alledged that they knew from tapes of phone calls that Johnson was keeping the victim in the trunk of his car. When the arrest was made, the victim was not there. The

kidnapping charges were filed the third day. On the fourth day, the victim's body was found.

Granted, the kidnapping complaint had been filed but jeopardy had not attached. See Okla. Const., Art. 2, § 21; Ridenour vs. Oklahoma, Okla.Cr., 231 P.2d 395 (1951); Cornell vs. Oklahoma, 91 Okla.Cr. 175, 217 P.2d 528 (1950) and McAllister vs. Oklahoma, 97 Okla.Cr. 167, 260 P.2d 454 (1953). Oklahoma could have easily transferred the kidnapping charge to Osage County. See 22 Okla. Stat. 126, 445. Johnson would respectfully suggest that exception (1) mentioned above could only be a valid exception where jeopardy attached.

In its brief, Oklahoma strains crediability by arguing that the Tulsa Police, when the kidnapping charges were filed, did not know the victim was dead. The victim, whom they knew had been removed from the trunk, was not in Johnson's apartment nor had he returned home. Their actions clearly show that the police knew the victim was dead.. It was not necessary to locate the victim's body to file a murder charge. See 40 C.J.S., Homicide, § 201, page 1102. Under Title 22, Section 124 of the Oklahoma Statutes, Johnson submits that the murder charge could have been prosecuted in Tulsa County, or in the alternative, removed to Osage County pursuant to Section 445 of said Title, if already filed in Tulsa County.

The prosecutors blundered in both Osage and Tulsa Counties either by carelessness or by design. Perhaps, Oklahoma was proper in originally filing the kidnapping charge, but after the body was found Oklahoma should have filed First Degree Murder by Kidnapping for Extortation in Osage County, which it did but later had to reduce to Second Degree Murder because it had already convicted Johnson of Kidnapping, and then dismiss the Tulsa County kidnapping charges. Under Oklahoma's theory, Oklahoma

could have charged Second Degree Murder in Osage County and moved the kidnapping charge to Osage County, having one trial thereby. By doing what it did, Oklahoma had two clear "shots" at Johnson in separate trials. Same is "double jeopardy."

Perhaps, both Tulsa County and Osage County had jurisdiction of both offenses. Certainly, the District Court of Osage County had jurisdiction of both charges had Oklahoma elected to lay venue there. See 22 Okla. Stat. §§ 438,445.

CONCLUSION: That Johnson has fully replied to Oklahoma's brief in opposition to Johnson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for petitioner, do hereby certify that I served a true and correct copy of the foregoing reply brief to arguments first raised in respondent's brief in opposition to petitioner's petition for writ of certiorari upon the respondent at the office of the Honorable Jan Eric Cartwright, Attorney General of the State of Oklahoma, by and through Assistant Attorney General, Timothy S. Frets, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, by depositing same in the mail at the Post Office in Pawhuska, Oklahoma, on the 24th day of October, 1980, with first clase postage thereon fully prepaid.

Billy Leon Haskett

Attachment